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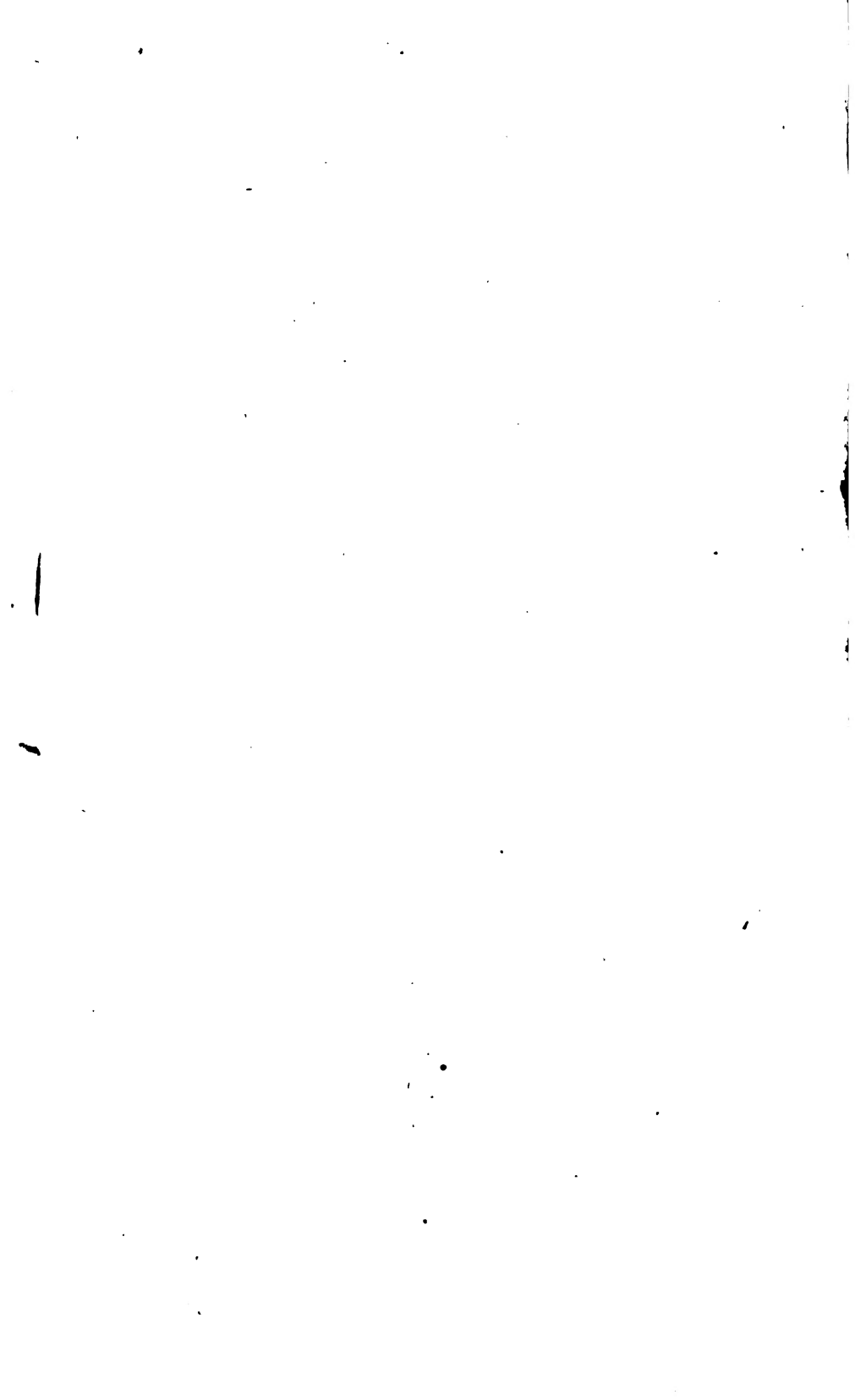
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REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
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—
VOLUME I.
—

BY WILLIAM MUNFORD.

NEW-YORK:
Printed and published by Isaac Riley.
1812.

DISTRICT OF NEW-YORK, ss.

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ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA:

At the term commencing in March, 1810.

IN THE THIRTY-FOURTH YEAR OF THE COMMONWEALTH.

JUDGES, WILLIAM FLEMING, Esquire, *President*.
 SPENCER ROANE, Esquire.
 ST. GEORGE TUCKER, Esquire.

ATTORNEY-GENERAL,
 PHILIP NORBORNE NICHOLAS, Esquire.

Gordon's Administrators *against* The Justices of
 Frederick.

Argued at the
 October term,
 1809.

IN this case, the decision of the Court, in *Braxton v. Winslow*, (1 *Wash.* 31.) was reviewed; doubts having been entertained whether the position there laid down, "that the plaintiff must shew, by an action brought against the executor, that he was a creditor, and must prove by an action against the executor and the *verdict* of a Jury, that he had committed a *devastavit*," before an action could be maintained on the administration bond, was, under the

It is necessary, after a judgment against an executor or administrator, as such, to establish a *devastavit*, by means of a second suit, before an action can be maintained on the administration bond.

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actual case then before the Court, to be understood as requiring an action of debt *suggesting a devastavit*, before an action could be maintained against the *securities* of the executor or administrator: in short, whether three suits were necessary; 1st. A suit against the executor or administrator, *as such*, to establish the amount of the *debt* due from the testator or intestate; 2dly. A suit against the executor or administrator, suggesting a *devastavit*, and a *verdict* and judgment therein for the plaintiff; and, 3dly. An action on the administration bond.

This was an action of debt brought in the County Court, in the name of the Justices of *Frederick*, at the instance of *N. Cartmill*, against the administrators of *Gordon* and their securities, in the administration bond. The pleadings disclosed a former judgment recovered by the relator (*Cartmill*) against the administrators, on the pleas of *payment, and fully administered; but it did not appear that there had been any INTERMEDIATE suit fixing a devastavit*. The Jury found a verdict for the plaintiff, subject to the opinion of the Court, "whether an action on the administration bond could be maintained, without shewing in evidence, in such action, a judgment *in an action of devastavit* against the administrators." The County Court gave judgment for the defendants, which, on appeal to the District Court, was reversed; and from that judgment of reversal, the defendants (the administrators and their securities) appealed to this Court.

Williams, for the appellants, relied on the case of *Braxton v. Winslow*, (1 Wash. 31.) recognised in *Call v. Ruffin*, (1 Call, 333.) as having settled the point, that an action cannot be sustained on an administration bond without a previous suit, *fixing a devastavit*, against the executor or administrator. By a note to *Turner v. Chinn*, (a) it appears, that the Judges consented to reconsider the case of *Braxton v. Winslow*; but no opinion was expressed on the

(a) 1 Hen. &
Munf. 54.

point. The question is, therefore, not influenced by what fell from the bench in the last-mentioned case.

But an additional reason may be given why a previous suit is necessary against the executor or administrator, to establish a *devastavit*, before an action is brought against the securities. The law declares, that no security for an executor or administrator shall be chargeable beyond the assets of the testator or intestate, on account of any omission or mistake in pleading, of the executor or administrator.^(a) It is, therefore, reasonable, that the amount of assets, wasted by the executor or administrator, should be ascertained by the verdict of a jury, before the securities are called on.

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Munford, for the appellees, observed an omission in the judgment of the District Court. They had failed to enter such judgment as the County Court ought to have rendered; but this Court might supply it, as was done in *Mantz v. Hendley*.^(b) The judgment reversing that of the County Court, being correct, should "so far" be affirmed; and the appellees, in that event, should recover their costs, "being the party substantially prevailing."

(a) 1 Rev.
Code, p. 165.
s. 33.

(b) 2 Hen. &
Munf. 318.

In this case the verdict was *general* in favour of the plaintiffs, as to every thing in controversy between the parties, except the point submitted to the Court, which was, "whether an action on the administration bond could be maintained without shewing in evidence, in such action, a judgment in an action of *devastavit* against the administrators." On such a verdict, every fact or circumstance, which (independently of the implied finding that no judgment had been obtained in an action of *devastavit*) could justify a decision in favour of the plaintiff, must be understood to have been proved to the Jury.^(c) We have, therefore, a right to presume that, in the original suit brought to establish the debt, a verdict was found against the defendant on an issue joined on the plea of *plene administravit*, by which verdict it was ascertained, that he

(c) Ford v.
Gardner, 1
Hen. & Munf.
72.

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And assets sufficient to satisfy the plaintiff's claim; that (judgment being entered accordingly) a writ of *feri facias* issued, and was returned *nulla bona*. The question propounded by the Jury to the Court was, whether, after all this had been done, it was necessary for the plaintiff to obtain another judgment, in an action suggesting a *devastavit*, before he could bring suit on the administration bond? On which question, I contend, the decision of the County Court was erroneous.

The *devastavit* was sufficiently fixed by the proceedings in the first action; so far, indeed, that the sheriff, instead of returning *nulla bona*, might have returned a *devastavit* positively; in which case, "the plaintiff might have had execution immediately against the defendant by *capias ad satisfaciendum*, or *feri facias de bonis propriis*." (a) The Sheriff having neglected to do this, the plaintiff's remedy, in England, would have been "by *scire fieri* inquiry, or action of debt upon the judgment suggesting a *devastavit*," (b) it being very questionable whether, in that country, an action can be brought against an administrator on the administration bond, assigning a *devastavit* as the breach of the condition; (c) and it being certain that no bond and security is there required of an executor. The not exhibiting a true inventory or account, it seems, may be assigned as a breach; (d) and in the case of *The Archbishop of Canterbury v. Willis*, 1 Salk. 251. pl. 3. cited in 2 B&C. Abr. p. 409. Dublin edit. (e) a suit was maintained on the bond, at the instance of a creditor, who assigned as a breach the failing to pay him his debt. But, whether the last-mentioned action could have been supported, if the defendant had made a proper defence, is doubtful, the authorities being contradictory. (f)

In this country, the proper remedy appears to be an action on the bond, which our act of Assembly directs to be given by executors as well as administrators; the object of that act appearing to be to substitute the action on the bond for debt suggesting a *devastavit*; since both, successively,

(a) Tidd's
Prac. 933.

(b) Ibid. 1019,
1020.

(c) Toller's
Law of Exe-
cutors, 382.

(d) Ibid.

(e) Title Ex-
ecutors, &c.
(E. 11.)

(f) See the
cases cited in
Toller, p. 382.

in the same case, are evidently *superfluous*. The bond may be put in suit for the benefit of any person injured; the *devastavit* may be assigned as a breach of the condition; and the plaintiff is bound, in that suit, to prove every circumstance which it is incumbent upon him to prove in the other.

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But the case of *Braxton v. Winslow*(a) is relied upon as establishing the position, that both actions are necessary. That case has been frequently misunderstood; and, in the present instance, is misapplied. The language used by the Court (as expressed by the reporter) was unfortunately equivocal and inaccurate, but plain enough, when construed (as it ought to be) with reference to the subject matter before them. The suit having been brought on the administration bond, *without any previous action* against the executor, the Court decided, (with great propriety,) that a previous action should have been brought to *establish the debt, and fix the devastavit*; but they did not mean to decide, that *two* such actions were necessary. If the *latter* had been their meaning, it would not have been *authority*; because the case then under consideration did not call for a decision of *that* point; for the principle is well settled, that opinions of Judges are authority, so far as they apply to the cases *actually* before them, and no farther.

(a) 1 Wash.
31.

The *dictum* that an executor shall not be presumed guilty of a *devastavit* till it is found against him by a *verdict*, seems to have been pronounced *obiter* only, without being requisite to the decision of *that* case. But, even admitting it correct, it does not follow that a verdict, in an action suggesting a *devastavit*, was intended by the Court; it might be equally effectual, and adequate to the purposes of justice, if rendered on an issue joined on the plea of *plene administravit* in the original action, and coupled with a subsequent *feri facias*, and return of *nulla bona*.

The case appears to have settled nothing, but that a *devastavit* ought to be *fixed*, before an action can be maintained on the administration bond. This question still re-

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curs, *what is requisite to fix a devastavit?* And this is answered, by the authorities already cited, as well as by the reason of the thing, that a *devastavit* is *fixed*, whenever it judicially appears, by the executor's own admission, or the finding of a Jury, *that he had assets*, and by the return of a sworn officer, that he had *wasted or concealed them*. The truth of the return may, indeed, be controverted by the defendant in the action on the bond; but, *prima facie*, it fixes the *devastavit* sufficiently to warrant the action. The same defence may be made, and the same evidence is admissible on both sides, in the action on the *bond*, as in that *suggesting the devastavit*. For what purpose, then, (but for the benefit of *lawyers*,) should *three* actions be resorted to, when *two* are sufficient? If it be said "for the protection of the *securities*, who, not being parties to the first action, ought not to be bound by a judgment improperly or collusively obtained against their principal;" I answer, that neither are the *securities* parties to the action suggesting the *devastavit*. Every objection, therefore, to a suit against them in the *second* instance, applies equally in the *third*.

The act of Assembly in favour of securities, (referred to by Mr. *Williams*,) cannot have the effect of preventing an action on the bond; the plain intention of that act being to provide that, notwithstanding any omission or mistake in pleading, of the executor or administrator, the securities (under the plea of *conditions performed*) may avail themselves of any defence to which their principal might have resorted on the plea of *fully administered*. Its meaning cannot be that, if the executor omit to make a proper defence, or be guilty of a mistake in pleading, no action shall lie against his securities until a second action (in defending which he may be equally negligent or unskilful) shall have been brought against himself. Much less can it mean that no action shall lie against his securities, in a case in which the executor has positively admitted assets, or a Jury have found that he has enough to satisfy the plain-

tiff's claim, and thereupon it appears he has wasted or concealed them, so that a writ of *feri facias* could not be levied upon them.

Cur. adv. vult.

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Monday, 26th March, 1810. The Judges delivered their opinions.

Judge TUCKER. This was an action upon an administration bond against the administrators and their *securities* for a *devastavit*, in which it was contended to be necessary to review the decision of this court, in the case of *Braxton v. Justices of Spotsylvania Court*, 1 Wash. 31.

The declaration (which is alleged to be at the instance of *Nathaniel Cartmill*) is in the usual form of a declaration on a bond for the payment of money; the defendants (without demanding *oyer* of the condition of the bond) pleaded *jointly conditions performed and plene administravit*. If this plea be regarded as the plea of the *administrators*, it might have been objected to, and ought not to have been received; as the plea of the *securities*, it was either an absurdity, or implied in the former plea of conditions performed. The plaintiffs, however, without objecting or demurring^(a) to the plea, replied that they ought not to be precluded from having their action aforesaid against the said defendants, (at the instance of the said *Cartmill*), by any thing in their plea alleged; because they say, that the defendants, the *administrators*, did not cause to be made a true and perfect inventory of the goods, &c. of the deceased which came to their hands, and did not exhibit an account of the same to the Court of *Frederick*, when thereto required; and did not faithfully administer the said goods and chattels in this; that the administrators aforesaid did not pay the amount of a judgment obtained in the said Court by *N. Cartmill* aforesaid, plaintiff, against the said defendants, for the sum of 72*l.* &c. in which suit the said administrators pleaded payment and *plene adminis-*

(a) See 3 East, 5.

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travit; and because the said administrators have wasted the estate aforesaid; and this they are ready to verify, and pray that the same may be inquired of by the country, and the defendants likewise. The Jury found for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of the amount of the judgment in the replication mentioned, "if the Court should be of opinion, that an action on the administration bond aforesaid, can be maintained without shewing in evidence in such action, *a judgment in an action of devastavit* against the said administrators, *John Kingan*," &c. "otherwise they find for the defendant." The County Court gave judgment for the defendant. The District Court reversed that judgment, with costs both in the District and County Court; but without adding such judgment as the County Court ought to have rendered. Mr. *Munford*, for the appellees, on the authority of *Mantz v. Hendley*,^(a) admitted, that this omission was an error in the judgment of the District Court, which this Court might amend. The case of *Bibb v. Cauthorne*,^(b) and what was said by Judge *Pendleton*,^(c) in the case of *Cabell v. Hardwicke*, are additional authorities in favour of Mr. *Munford's* concession; and shew what kind of judgment the Courts ought to pronounce in suits upon executors' bonds, where the plaintiffs may be entitled to a judgment.

(a) 2 Hen. &
Munf. 518.

(b) 1 Wash.

(c) 1 Call,
369.

(d) 1 Wash.
31.

But we are called upon by the counsel for the appellees to review the decision of the Special Court of Appeals in the case of *Braxton, Executor of Claiborne*, against *Winslow and others, Justices of Spottsylvania County*,^(d) which was an action of debt brought, as in the present case, upon an *executor's bond*, against the securities, to subject them to the payment of a bill of exchange. The suit was instituted upon the bond at the instance of the endorser of the bill of exchange against the executor's securities, without having previously obtained a judgment against the executor *upon the bill of exchange*: here the two causes differ; the relator in the present case having, previously to

the commencement of this suit, obtained a judgment (as is suggested in the replication) against the administrators for the sum of 72*l.* to be discharged by the payment of 36*l.* with interest and costs. But, whether this judgment was against them *personally*, or for a debt of their intestate, or whether they were chargeable by that judgment *de bonis propriis*, or only *de bonis testatoris*, we are left in the dark by the replication. But this, perhaps, may be aided by the verdict. I shall therefore pass it over for the present. To return then to the case of *Braxton v. Winslow*.

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After *oyer* of the bond and condition, the defendants (securities) pleaded conditions performed: the replication traverses the plea, and charges a breach in the non-payment of the bill of exchange, which was protested, of which the executor had notice, but had not paid it; having paid debts of inferior dignity after such notice, and *wasted the assets*. The defendants rejoined, and by protestation say the executor had *not wasted the assets*. The Jury found that there was 1,114*l.* due to the relator upon the bill of exchange, and that the executor had *wasted the assets*; and judgment was entered for the penalty of the bond, but to be discharged by the payment of 1,114*l.* as to this breach. From this judgment the defendants appealed.

Two questions were submitted to the Court. The first it is unnecessary to notice; the second was,

“Whether the action could be maintained before a judgment first had by the plaintiff against the *representatives of the debtor*, and an execution and return of *nulla bona*.”

The Court, in the discussion of this question, is reported to have said, “The true question is, has the relator brought himself within the act; or, in other words, *does it appear from this record*, that he is a party *injured* within the words and meaning of the act. *A man who claims as a creditor*, and means to take the benefit of this act, [1748, c. 3.] must *shew himself to be a creditor*; that the testator left *assets*; that they *came to the hands of the executor*; that there was a *sufficiency to discharge his demand*, or so

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much thereof, after paying debts of *higher* dignity; and that *the executor* has wasted the assets. Without this *concurrence* there is no injury done him." The report proceeds thus:

"An attempt was made at the bar to shew, that the paying of debts of an inferior dignity, first, was of itself a *devastavit*; and that a *devastavit* for ever so trifling a sum, renders the executor liable for the whole demand, although assets to the twentieth part never came to his hands. *But neither reason nor authority warrant* this doctrine; for, surely, if there be a sufficiency of assets, it is of no consequence in what order they are paid. But the person who means to make use of this act must shew himself to be a *creditor* in the *usual course of law*. It is not enough to produce a mere document of a debt; he must first institute a suit against the executor or administrator, because it is, in the first instance, a *dispute between creditor and debtor*, whether or no a *debt* actually exists; a dispute, which the securities to such a bond (who are *strangers to the contract*) are by no means competent to manage. It is a principle of universal law, that both parties shall be heard. Let us put this case: suppose *A.* binds himself in a bond to *B.* to pay him whatever sum *C.* owes him, (*B.*); now, before a forfeiture is incurred by *A.*, must not *B.* first prove the sum that *C.* actually owes him? Mr. Waller, (the relator,) therefore, ought to have shewn, by an action against the executor, that he was a *creditor*."

Thus far the relator in the present case (if the breach be sufficiently assigned in the replication) may be said to have proceeded. He has alleged that he has obtained a judgment against the administrators; and I will suppose it to be for a debt due from their *intestate*.

The Court proceeds thus. "He (the relator) ought to have shewn by his action against Moore, the executor, that he had committed a *devastavit*; a suggestion of a *devastavit* may be likened to a criminal prosecution, and an executor shall not be presumed guilty of a *devastavit* till it is found against him by a verdict."

Here then we are brought to the inquiry, by what course of proceeding this fact may be found against an executor by a verdict.

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Anciently, if the sheriff returned *nulla bona*, and also a *devastavit* to a *feri facias de bonis testatoris* sued out on a judgment obtained against an executor, it was sometimes the practice to sue out a *capias ad satisfaciendum* against the executor; or a *feri facias de bonis propriis*. But the better and more frequent method was, to sue out a *scire facias*, and obtain an award of execution before issuing the *feri facias de bonis propriis*. But the most usual practice upon the Sheriff's return of *nulla bona* to a *feri facias de bonis testatoris*, was to sue out a special writ of *feri facias de bonis testatoris*, with a clause therein, *et si tibi constare poterit*, that the executor had wasted the goods, then to levy *de bonis propriis*. And this we are told continued to be the practice of the King's Bench until the time of Charles I.; but in the Common Pleas a practice had prevailed in early times upon a suggestion in the special writ of *feri facias* of a *devastavit* by the executor, to direct the Sheriff to inquire by a Jury whether the executor had wasted the goods, and if the Jury found he had, then a *scire facias* was sued out against him; and, unless he made a good defence thereto, execution was awarded *de bonis propriis*, which practice was, about the time of Charles I. recommended by the Court of King's Bench to be adopted in that Court likewise. It afterwards became the practice of both courts, for the sake of expedition, to incorporate the *feri facias* inquiry, and *scire facias* into one writ, thence called a *scire fieri inquiry*. This writ recites the *feri facias de bonis testatoris* sued out on the judgment against the executor, the return of *nulla bona* by the Sheriff, and then suggesting that the executor had sold and converted the goods of the testator to the value of the debt and damages recovered, commands the sheriff to levy the said debt and damages of the goods of the testator, in the hands of the executor, if they could be levied thereof; but, if it should appear to him, by the inquisition of a

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(a) See *Lilly's*
Ent. 664-666.

(b) 2 Lord
Raym. 1382.
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ner. 1 *Str.*
623. S. C.

(c) 2 Lord
Raym. 974.

(d) 1 Lord
Raym. 590.
3 *Black. Com.*
216.

(e) 1 *Rev.*
Code, p. 165.

(f) 2 *Wash.*
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Jury, that the executor had *wasted* the goods of the testa-
tor, then the Sheriff is to *warn the executor* to appear, &c. (a)

And if the Sheriff omits to give notice to the defendant of
the time the writ is to be executed, the inquisition may be
set aside for that cause. (b) And this practice, we are told,

is still frequently adopted in *England*; but in this country
no case of the kind has occurred within my own expe-
rience. But the most usual mode of proceeding, even in

England, is by action of debt upon the judgment, suggest-
ing a *devastavit*, which, we are told, was substituted in

lieu of the proceeding by *scire fieri inquiry*. (c) The *foun-*
dation of this action is a judgment obtained against the ex-
ecutor. A judgment against an executor or administrator,

whether by default, (that is, by neglect *after* an appear-
ance, for in *England* no judgment can be in a personal ac-
tion without appearance,) (d) or upon *demurrer*, or upon a

verdict on any plea, pleaded by the executor, except *plene*
administravit, or admitting assets to such a sum, *et rien*
ultra, is, in *England*, (and perhaps in this country before

the act of 1806, c. 21.) *conclusive* upon *him* that he has
assets to satisfy such judgment. But our act of 1792, c.

92. s. 33. (e) declares, that no *security* for any executor or
administrator shall be chargeable *beyond the assets* of the
testator or intestate, by reason of any *omission* or *mistake*

in pleading, or *false pleading*, of such executor or adminis-
trator. The effect of this provision, as it relates to the *se-*
curities, I shall consider hereafter. Indeed, if the execu-

tor or administrator plead either a general or special *plene*
administravit, it is now held, that he is only liable to the
amount of the assets proved to be in his hands; (f) though

the case was formerly taken to be, that if any assets, how-
ever small, were proved to be unadministered, the plaintiff
was entitled to recover his whole demand from the execu-

tor: so that now a judgment against an executor on a ver-
dict upon *plene administravit*, is only an admission of as-
sets to the extent of assets which may be proved to be in

his hands. If, therefore, upon a *fieri facias de bonis testa-*

toris, on a judgment obtained against an executor by either of the ways above mentioned, either no goods can be found, which were the testator's, or not sufficient to satisfy the demand; or, (which is the same thing,) if the executor will not expose them to the execution, that is evidence of a *devastavit*. And the English authorities in general seem to consider it as *conclusive*; but Serjeant Williams, in his note on the case of *Hancock v. Proud*,^(a) says, that to a *scire facias* on a judgment, or action of debt suggesting a *devastavit*, the defendant cannot plead *plene administravit*, but only controvert the *devastavit*; of which fact the judgment and Sheriff's return of *nulla bona testatoris*, are almost *conclusive* evidence; and the judgment will be against the defendant *de bonis propriis*. The mode of proceeding is immaterial, it is said, because the executor is entitled to the same defence in an action of debt upon the judgment suggesting a *devastavit*, as in the proceeding by *scire fieri inquiry*. The usual course in an action of debt is, first, to sue out a *fieri facias* upon the judgment obtained against the executor, and, upon the Sheriff's return of *nulla bona*, to bring the action, and state in the declaration, the judgment, the writ, and return; and, on the trial, to give in evidence the judgment, the *fieri facias*, and the return, to prove the case. There are certain rules equally applicable to the proceeding by *scire fieri inquiry*, and to the action of debt on a *devastavit*; 1st. The return of a *devastavit* by the Sheriff, on the execution issued upon the first judgment against the executor, is not *conclusive*, and therefore the executor may *traverse the devastavit*, whether it be found by the *inquisition*, or returned by the Sheriff. The form of the *traverse* is indeed different. In the *scire fieri inquiry*, the executor precisely and expressly denies the *devastavit* found by the *inquisition*, and takes issue upon it.^(b) But, in an action of debt, the whole may be given in evidence on *nil debet*.^(c) or on *not guilty*.^(d)

2dly. The executor cannot, in either case, plead *plene administravit*, or any other plea of the same nature, which

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(a) 1 Saund.
336.

(b) See 1
Saund. 306.
Lilly's Ent.
666, 667.
2 Saund. 402.
(c) 1 Saund.
219. 2 Lord
Raym. 1502.

(d) 1 Salk. 814. 2 Lord Raym. 1503. 1 Term Rep. 462.

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(a) See 6 T.
R. 1. *Mara v.*
Quin; and 2
Wash. 187.
Ruffin v. Pen-
deton. Bull.
N. P. 169.
Taylor v.
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puts his defence upon want of assets, unless the first judgment were of assets *in futuro*, or the declaration in the second action should suggest a *devastavit* of assets which had accrued after the judgment declared upon; in both which cases, such pleas have been held admissible. (a) The reason is, that such plea (except in the cases just mentioned) would be contrary to what is *admitted* by the judgment in the first action. And, if the truth were, that the executor had no assets, he should have set it up as a defence to the original action, which having neglected to do, he shall not be permitted to say so afterwards. For it is a general rule, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a *scire facias*. And, if he did plead *plene administravit* to the original action, and the judgment was had upon a verdict, finding that *he had assets sufficient* to satisfy the debt, he is of course equally *concluded* from saying that he had no assets. But, if the verdict in the original action do not find, upon the plea of *plene administravit*, that there are assets *sufficient* to pay the debt, or if it do not find the *value* of the goods in the hands of the defendant, if *not sufficient* to satisfy the plaintiff's demand, as such a verdict would be uncertain and insufficient upon the issue joined, the judgment founded upon it may be re-

(b) 2 *Wash.*
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versed for error. (b) And for the same reason that the executor cannot plead the want of assets, (except in the cases above mentioned,) he cannot *give in evidence* the want of assets on the trial of the *devastavit*, either in the *scire fieri inquiry*, or in the action on the *devastavit*; nor even upon a writ of inquiry after judgment by *default* in the original action, according to the practice in *England*. See 1 *Saund.* 219. n. 8. *Wheatly v. Lane*, in which the editor, Serjeant *Williams*, has given a most copious and satisfactory view of this subject.

Such appears to be the modern course of proceeding against an executor in *England*, in order to charge him

personally for a *devastavit*, and such the course by which he may defend himself against the charge; and, in my opinion, they will justify what is reported to have been said by the Court, 1 Wash. 33. "an executor shall not be presumed guilty of a *devastavit* till it is found against him by a *verdict*." The action of debt upon the first judgment, is the clearest, simplest, and most unexceptionable course of proceeding, because the declaration, in such an action, must set forth the whole of the plaintiff's case, and give the executor notice of the particular charge against him. Whereas, in an action of debt upon the executor's bond, the ordinary practice *here* seems to be, to declare upon the bond, as upon a bond for the payment of money, without setting forth the condition, or alleging any particular breach thereof; leaving it to the defendant whether the executor himself, or his *representatives* if he be dead, or the *security* if joined with him in the action, or *sued alone*, (as was done in the case of *Taylor v. Street*,) to *guess* at the breaches which *may* be afterwards assigned in the *replication* as in the case now before us. There is too much room for *surprise* in such a course of proceeding, which can hardly be practised in an action of debt brought upon the judgment, and suggesting a *devastavit*; a circumstance of itself sufficient in my eyes to give the preference to the latter action. But our act of 1792, c. 92. s. 33.(a) affords a stronger reason (one indeed that is conclusive to my mind) why this course of proceeding which I recommend must be adopted in all cases arising upon any executor's or administrator's bond executed since the commencement of that act, which expressly declares, "that no security for any executor or administrator shall be chargeable *beyond the assets* of the testator or intestate, by reason of any *omission* or *mistake* in pleading, or *false pleading*, of such executor or administrator." Put the case, that an executor, who has never received more than \$100 of his testator's estate, shall, by his own inattention or mismanagement, or that of his counsel or attorneys, have made *himself* personally

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(a) 1 Rev.
Code, p. 165.

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liable to satisfy judgments against him for demands against his testator for \$10,000. Can the *securities* be charged for more than the \$100, if that were, in truth, the whole of the assets? Certainly not. Is it not then incumbent on the creditor, when he brings an action against the *securities*, to shew that assets sufficient to discharge his debt have come to the hands of the executor, and that he has *wasted* them? Certainly it is; nor will it be sufficient to shew that the executor either by his *neglect*, or *false pleading*, has made *himself* liable for the debt *personally*, without shewing that he *actually* had *assets* sufficient to pay the debt, or a part thereof.

It may be asked, perhaps, how is a creditor to ascertain the amount of the assets which have come to the hands of an executor? The law, I conceive, has sufficiently pointed out the method; it requires the executor to give bond, with condition, "to make a true and perfect inventory of all the goods, chattels, and credits of the deceased, which have, or shall come to the hands, possession, or *knowledge* of the executor, or into the hands and possession of any *other person*, for him, and the same so made to exhibit into the Court granting the probate, (or letters of administration, as the case may be,) *at such time as he shall be thereunto required by the Court.*(a) His oath also binds him to make a true and perfect *inventory*, and also a just account *when thereto required.*(b) If an executor should unreasonably delay to make and return an inventory, any creditor or other person interested in the estate might, by application to the Court, procure him to be summoned to return an inventory. By this course, which is conformable to the practice in *England*,(c) the amount of the assets may be ascertained, and by the same course the account of his executorship, which is also to be exhibited when thereto required by the Court, may likewise be obtained. And surely this course is infinitely more likely to attain the great ends of justice, than to trust to a common jury to adjust and settle a complicated account of an executor's or admi-

(a) 1 Rev.
Code, p. 163.

(b) *Ibid.* p.
162.

(c) See *Nelson's Lex
Testamentaria*, p. 355.
*Sir T. Raym.
Rep.* 470. 6
Term Rep.
6 *Mara v.*
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nistrator's transactions, in a contest between a creditor and the security for the executor or administrator. Or should a resort to a Court of Equity be found necessary for a discovery of assets, which may be concealed by the executor, or may have gotten into the hands of legatees, or others, with the assent or connivance of the executor or administrator, that Court might direct an account, as was done in this Court in the case of *Taliaferro & Gaines v. Thornton & Wife*,^(a) against all parties, however remotely concerned in interest; the same course I perceive to have been intimated by Judge *Pendleton*, in the case of *Burnley v. Lambert*,^(b) and *White, Whittle & Co. v. Banister's Executors*,^(c) which I shall notice hereafter; and to have been pursued by the present Chancellor of the *Richmond* District, in that of *Clarke v. Webb and others*.^(d)

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^(a) May 5,
1806, MS.
^(b) 1 Wash.
312.
^(c) *Ibid.* 168.

^(d) 2 Hen. &
Munf. 8, 9.

To return to the case of *Braxton v. The Spottsylvania Justices*. The Court proceeds to say: "It may be objected that the act does not prescribe that a creditor shall not go against the securities in the first instance; and, therefore, that the action was well brought; to which this answer presents itself, that it is an established principle of construction, that where a statute has given a new remedy, without pointing out the mode in which this remedy is to be attained, the rules of the common law, and the practice of the Courts, founded upon the reason of the thing, shall be pursued." I subscribe most fully to this, as to every preceding part of the opinion, which is reported to have been unanimously given in that important case.

Those who object to the delay which such a course of proceeding must require, would do well to consider that this is an additional remedy given by our law against executors; who, neither by the common law, nor by any statute in England, can be compelled to give bond and security for their conduct. And the creditor was, by the common law, as much without a remedy against the ordinary, (who was

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originally in the place of an administrator,) as he now is against an *executor* in *England*, under any statute of that country. For the ordinary, at common law, might have disposed of the whole of the intestate's personal chattels, and could not be compelled to grant administration, nor was even so much as obliged to pay debts; but several statutes being made by which power was given to him to grant the administration, and to pay the debts, he therefore obliged the administrator to bring in an inventory, and to see that it was distributed in payment of debts; and, finally, the statutes required (as our law does) that the administrator should give bond for the faithful performance of his duty. But the last statute upon the subject, 22 and 23 *Car. II. c. 5.* was never in force in this country; so that the remedy given by our acts of assembly is not, as was contended by Mr. *Munford*, a *substitute* for the action of debt upon a judgment against an executor suggesting a *devastavit*; but, as was said by the Court in the case of *Braxton v. The Spottsylvania Justices*, an *additional* remedy which our law has given to *creditors*, *legatees*, and *distributees* of persons deceased, for their benefit and security. Have they then a right to complain that they shall not be permitted to avail themselves of this *additional* remedy against an *innocent security*, until they shall shew the nature and amount of their claims; that the testator left assets to a *certain amount*; that they came to the hands of the executors, who have *wasted them*; and that there was sufficient thereof to have satisfied their demands in a due course of administration?

The only case that I have met with in the *English* books of an action at law brought upon an administration bond against the *securities* of the administrator, is that mentioned in the case of *Greenside v. Benson*, 3 *Atk.* 248. There the creditor, *Benson*, had brought an action against the administratrix on a bond of her husband, the intestate, for 300*l.* to which she pleaded that she had not assets *ultra* 54*l.*, which she paid into Court. *Benson*, not being satisfied

with the inventory brought in by her, procured an assignment of the administration bond, and put it in suit, by bringing *three several actions*, one against the administratrix, and one against each of the securities; and assigned for breach that she had *not exhibited a true and perfect inventory*.

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These causes came on to be tried, and *no defence was made by the two securities*, and there was judgment for the plaintiff by default.

The *securities* brought a bill against *Benson*, the creditor, and *Mrs. Hudson*, the administratrix; and the relief prayed was, that the defendant, the administratrix, might *indemnify* the *plaintiffs* for being sureties in the administration bond, and for an injunction against *Benson*, the creditor, till an account should be taken between them and *Mrs. Hudson*, and till she should have satisfied *Mr. Benson*, as far as the assets would go.

The counsel for the defendant, *Benson*, further stated, that the administratrix pleaded to the defendant's action, that she had assets only amounting to 55*l.* beyond what she had already paid, but the Jury found 226*l.* beyond the 55*l.*, so that the creditor became *entitled to both sums*.

Lord Ch. *Hardwicke* said, the administratrix could not then dispute the verdict which had been found against her; nor was the case of the sureties at all better, as the verdict was obtained against the administratrix, who was the *proper person to try it*; that he did not think it proper to have the whole account taken over again, or to alter what had been found by the verdict, and directed an account to be taken only of what was *exhibited upon the inventory*, and the *verdict to stand as a security* for so much as that should *fall short* to satisfy the defendant's principal and interest on his bond.

If the law of *England* had been conformable to our act of 1792, c. 92. s. 33.(a) the latter part of this decree must have been changed; for, undoubtedly, the *securities* in that case could only have been made chargeable to the amount of the assets found by the verdict.

(a) This act was first passed in 1785, c. 61. and had its commencement January 1, 1787.

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But my principal object in citing this case was to shew, that in *England* they think it necessary to proceed *separately* against the administrator, and shew the amount of the assets which have come to his hands before they sue the *sureties*, instead of bringing a joint action against them all, before they have established either the amount of the assets, or the liability of the administrator, as the plaintiffs have done in this suit; and further to shew that that part of the decree, which declares that the verdict against the administratrix should stand as a security only for so much as the inventory might fall short of the payment of the creditor's debt, is according to the spirit of the decision in *Braxton v. The Spottsylvania Justices*; that the creditor must pursue the estate of the deceased until it is exhausted, before any suit can be brought against a security upon the administration bond.

(a) 1 Wash.
168.

In the case of *White, Whittle & Co. v. Banister's Executors*, (a) Judge *Pendleton*, in delivering the opinion of the Court, said, "A creditor may, at law, either sue out execution upon a judgment obtained against the executors, and levy it on the visible property of the testator, if any; or, *if none be found*, 2dly. He may proceed against the *executors*, as for a *devastavit*, on account of a misapplication of assets; or, 3dly. A creditor may not know the state of the assets, the amount, nor the claims against the estate; he may therefore file his bill in equity to have a *discovery* of those matters, and on that discovery being made, *may either proceed at law*," (that is to say, upon the executor's bond, as I understand him,) "or that Court may retain the cause," (as was done in this Court in the case of *Taliaferro & Gaines v. Thornton & Wife*, before mentioned,) "and determine the disputes between the parties." This seems to me to be perfectly in conformity to the principles which were supposed to have been settled in the case of *Braxton v. The Spottsylvania Justices*.

Upon these grounds, I am of opinion, that the opinion of the County Court in favour of the defendant upon the

point reserved, was correct ; and, therefore, that the judgment of the District Court reversing that judgment ought to be reversed, and that of the County Court affirmed.

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Judge FLEMING. This case has been so fully stated and investigated by Judge TUCKER, that it is unnecessary for me to add any thing farther than to observe, that it seems now a settled principle, that a creditor of a deceased person cannot charge, or have recourse against the securities in an executor's or administration bond, until he has pursued the estate of the testator, or intestate, to the utmost extent of the law, and proved, by the *verdict* of a Jury, a *devastavit* on the executor or administrator, as the case may be, and then no farther than assets shall appear to have come into his hands ; I therefore concur in the opinion, that the judgment of the District Court be reversed, and that of the County Court affirmed.

By *both the Judges*, (Judge ROANE not sitting in the cause, on account of his being interested in a suit which involved the same point,) the judgment of the District Court REVERSED, and that of the County Court AFFIRMED.

Friday,
March 9.

Harrison against Brock.

1. Although, upon a demurrer to evidence, the testimony adduced on both sides ought regularly to be stated, yet, if it be *peral* and *contradictory*, the party tendering the demurrer cannot, after exhibiting his testimony, compel the other party to join in demurrer; for this, in effect, would be to enable the demurrant to confer credibility on his own witnesses, or at least to carry their credibility to be adjudged by an improper tribunal; the *Jury*, and not the *Court*, being exclusively judges of credibility.

THIS was an action of *assumpsit* in the County Court of *Amherst*, by *Josiah Harrison* against *Joseph Brock*, for the carriage of tobacco and other produce by the plaintiff, a waterman, for the defendant, at his special instance and request. The declaration was filed in *May*, 1799; a common order against the defendant, for want of appearance, confirmed, and a writ of inquiry awarded, at *June* Rules, 1799, but afterwards set aside at *May* Quarterly Court, 1800, on the motion of the defendant, who pleaded "arbitrament and award;" (*in those words only*;) to which the plaintiff replied generally, and the cause was continued at the defendant's costs. At the ensuing *November* term, the defendant pleaded *non assumpsit*, "in addition to his former plea," and issue being joined, a Jury was empannelled, but could not agree. In *August*, 1801, and *May*, 1802, verdicts were successively had for the plaintiff, but new trials awarded.

At *August* term, 1802, a fourth Jury having been sworn, the defendant demurred to the plaintiff's evidence, stating in his demurrer, "that on the trial of this cause it was proved that, some time about the 3d of *August*, 1798, the defendant was indebted to the plaintiff in the sum of

2. An award made *pendente lite*, cannot be given in evidence upon the plea of *non assumpsit*.

37*l.* 8*s.* 3*d.* for the carriage of tobacco and other produce; that on the day aforesaid, the plaintiff made application for payment thereof to a certain *William Stevens*, who was factor and storekeeper for the defendant, who was a mer-

chant. Payment in money was refused; but *Stevens* told the plaintiff that he had a promissory note executed to the said *Stevens* by a certain *Samuel Holt*, for the sum of 49*l.*

3. The plea of "arbitrament and award" (*in so many words*) is a mere nullity, and no evidence should be received to support it, notwithstanding the plaintiff replied generally.

4. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence.

6s. 3d., dated 11th *May*, 1798, and payable sixty days after date, with interest from the date if not punctually paid, and proposed trading the same to the plaintiff. *Harrison* agreed to take the *whole* of said note in payment; this was refused by *Stevens*; but it was at length agreed that *Harrison* should take the said note in payment, and execute his notes to *Stevens* for the difference between the said note of *Holt* and his claim against the defendant. *Harrison* accordingly executed two notes bearing the same date aforesaid, to the said *Stevens* in his own right, and not as agent, for 5*l.* 19s. each. The note on *Holt* was then delivered to the plaintiff, and an entry was made by *Thomas Woodroof*, another agent and storekeeper for the defendant, in the books of the said defendant, by which *Harrison* was charged to the said *Stevens* for the amount of *Harrison's* claim against the defendant, and *Stevens* was credited for the same, and the said *Harrison's* account was balanced, which said entry was read to the plaintiff by the said *Woodroof*, who asked the plaintiff if he agreed to it, and he replied he did. These facts were proved by *Thomas Woodroof* alone, who also said that, at the time of the trade aforesaid, the note executed by *Holt* was not due, and that he the said witness was present, and heard the whole of the conversation relative to the said trade. Some short time afterwards *Harrison* presented the note to *Holt* for payment, which was not made. He immediately returned to *Stevens*, and wished him to take back the said note, which *Stevens* refused, alleging it was a fair trade. *Holt* was believed by many to be insolvent at the time of the trade aforesaid, and it was proved that *Stevens* himself believed him to be so, but at the time of the trade told *Harrison* he expected he would get the money upon application. It was also proved by a certain *William Shelton* that, some short time after the trade aforesaid, he was at the store of the defendant, when a dispute arose between the plaintiff and the said *Stevens*; that, on hearing them, he found that they differed as to facts; that he called upon the said *Woodroof* above mentioned to

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know if he was present, and heard the contract as to the note aforesaid ; *he then said he was not present the whole of the time*, but was present when the entry aforesaid was made. *Shelton* also deposed that, previous to the trade aforesaid, *he* had told the said *Stevens* that *Holt* was insolvent. *It was further proved that, some time afterwards, Harrison, the plaintiff, applied to the said Stevens, and told him that, if he would not take back the said note on Holt, he must assign it to him, WHICH HE POSITIVELY REFUSED.* It was also said by the said *Shelton*, who had been long in the mercantile line, that it is not usual for merchants to call their customers to their day-books after making entries, and read the entries over, and ask them if they agree to the same. It was also proved by the said *Shelton*, *that the said Stevens was to receive a liberal interest for all sums lent the defendant.* It was also proved that the defendant had no personal agency, and no knowledge of the trade of the note aforesaid."

The demurrer farther stated, "it was proven by the *defendant*, that the matters in controversy in this suit were submitted to the determination of *John Wyatt, William Ware, and Reuben Norvell*, or any two of them, by an agreement entered into in the following words and figures, to wit: Whereas a dispute hath arisen and is now depending between *Josiah Harrison*, of the County of *Amherst*, of the one part, and *Joseph Brock*, of *Orange County*, of the other part, respecting the payment of a bond by *William Stevens*, as agent for the said *Joseph Brock*, which bond was payable from *Samuel Holt* to said *William Stevens*; now, for the ending and deciding thereof, hereby it is mutually agreed by and between the said parties, that all matters in difference between them shall be referred and submitted to the arbitration, final end and determination of *John Wyatt, William Ware, and Reuben Norvell*, or any two of them, arbitrators indifferently elected by said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing ready to be delivered to the said parties,

or either of them, who may desire the same, *on or before August Court next ensuing*. And it is hereby mutually agreed by and between the parties aforesaid, *that this submission shall be made a rule of the County Court of Amherst*. In witness whereof, the parties to these presents have hereunto set their hands this 28th day of *June, 1799*. *Josiah Harrison, (seal.) William Stevens, for Joseph Brock, (seal.)* That two of the said referees did proceed to make up an award in the following words and figures, to wit: "We, the subscribers, mutually chosen by the parties to decide and determine a certain matter in dispute, between *Josiah Harrison, of the Connty of Amherst, of one part, and Joseph Brock, of the County of Orange, of the other part, respecting a bond due from Samuel Holt to William Stevens, and which said bond was by the said Stevens given in payment of a debt due from the said Brock to the said Harrison, after maturely considering the testimony adduced, are of opinion, and do hereby award, that the said bond was received in payment, and ought to go (without recourse) to the extinguishment of the said debt. Given under our hands this 30th day of June, 1799. John Wyatt, Reuben Norvell,*" which was duly delivered to the parties. The said award was made in the presence of both parties, both parties agreeing to the trial, and after hearing the testimony offered by each. It was proven by one of the arbitrators that, at the time of making up the award aforesaid, the plaintiff and the said *Stevens*, who was agent for the defendant, differed in their statement of facts; the plaintiff alleging, that there were certain facts known to the said *Stevens*, which he could not deny if upon his oath. The arbitrators had then made up their opinion upon the subject, as expressed in the award aforesaid, but had not actually signed the award; but, to satisfy the plaintiff, examined the said *Stevens* on oath, previously observing to the plaintiff, that nothing that *Stevens* should say in favour of *Brock* should have any effect, but that, if he said any thing in favour of *Harrison*, it should be attended to. It was

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proven further by one of the arbitrators, that no impression was made on their minds by the examination of the said *Stevens*, but that they made up their award on the other testimony adduced by the parties; and that the principal cause which induced them to render the award aforesaid was, that evidence was produced to them to shew that *Harrison* preferred the debt on *Holt* to his debt from the *defendant*, inasmuch as he, the said *Harrison*, believed that the circumstances of *Holt* were better than those of *Brook*. It was proved that the attorney, who appeared for the plaintiff before the arbitrators, objected to the examination of the said *Stevens* as being illegal, but they did proceed to examine him merely to satisfy the plaintiff himself."

The plaintiff objected to joining in this demurrer, alleging, "there was a contradiction and clashing of evidence, and that the weight of said evidence and circumstantial proof ought to be determined by the Jury; which objection was overruled by the Court, and the plaintiff compelled to join in the demurrer, because it appeared to the Court that the facts adduced in evidence were fully and fairly stated in the demurrer;" whereupon the plaintiff filed a bill of exceptions. The Jury found a verdict for the plaintiff for 51*l.* 5*s.* 6*d.* damages, subject to the opinion of the Court upon the demurrer.

At *March* Court, 1803, (the demurrer being argued,) the Court gave judgment for the *plaintiff*; but, upon a writ of *supersedeas*, this judgment was reversed by the District Court holden at *Charlottesville*; the reason assigned being, "that the *award* made between the parties should have been considered as *final and conclusive*;" and thereupon the plaintiff appealed to this Court.

Munford, for the appellant. The County Court ought not to have ruled the plaintiff to join in demurrer; the evidence offered by him being *parol* and *circumstantial*, and testimony to *contradict* it being adduced by the defendant, instead of *admitting* its truth as he ought to have

done.(a) But this being an error committed by the Court at the instance of the *defendant*, the *plaintiff* is entitled to the benefit of the decision, which was in *his* favour, and correct upon the merits.

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The plaintiff proved his claim in the first place. The defendant endeavoured to overthrow it by proof of delivery of a note. In such case, "the defendant must prove the agreement of the plaintiff to *accept* the thing delivered *in satisfaction*."(b) But, as to this point, the testimony adduced is doubtful. *Thomas Woodroof* is the only witness, and he unworthy of credit, having told different stories at different times, and being strongly opposed by other circumstances. On a demurrer to evidence, the Court must presume any and every fact which the Jury might out of complicated testimony have inferred.(c) The Court, in this case, might have inferred that the plaintiff was imposed upon by *Stevens*, in passing upon him *Holt's* bond, knowing it to be good for nothing, and were therefore right in disregarding the pretended payment by the transfer of that bond.

(a) 5 Rep.
104. *Baker's*
case. 3 T.
Bl. 372 n.
26. 1 Doug.
119. *Cock-*
sedge v. Fan-
shaw. 2 Tidd's
Pr. 793 citing
2 H. Black.
187. *Gibson*
v. *Johnson*.
Hunter.
(b) *Peake's*
Ev. 249.

(c) 2 Wash.
210. *Stephens*
v. *White*.

2. The plea of "*arbitrament and award*" was no plea, for reasons similar to those which influenced this Court to decide that the word "*justification*" was no plea in slander.(d) And though this was a mispleading, and the issue joined immaterial, the *defendant*, who was the party guilty of the first fault in pleading, has no right to take advantage of it.(e) A repleader ought not to be awarded, but the plea should be disregarded.

(d) *Kirtley v.*
Deck, 3 Ben.
& Munf. 388.

(e) *Ibid*.

3. The evidence of the *award* should not have been received on the plea of *non assumpsit*. By that plea, the defendant puts the plaintiff on proving the whole of his case, and entitles himself to give in evidence any thing which shews that no debt was due at the time the action was commenced.(f) Now, this award was made after the action brought, and should, therefore, have been specially pleaded, as a matter of defence arising *puis darrein continuance*. Besides, it could not be a bar, without a rule of

(f) *Peake*,
248. *Tidd's*
Pr. 592.

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(a) 1 Rev.
Code, c. 52.
p. 49, 50. 2
Lord Raym.
759.

(b) *Yidd's*
Pr. 748, 749.
citing 8 Co.
82.

(c) *Ibid.* ci-
ting 8 Term
Rep. 139.

Thompson v.
Charnock.

(d) *Ibid.* 749.
756.

(e) 2 Term
Rep. 64.

Owen v. Hurd.

8 Term Rep.

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Court. (a) The agreement was, that the submission *should* be made a rule of Court; but this was never done, and appears to have been neglected as much by the defendant as the plaintiff. It was not proved in Court by the affidavit of any witness thereto, (as the act concerning awards requires,) nor "entered in the proceedings of the Court," nor was a rule thereupon made by the Court. Without such rule, it was a *mere agreement* to submit to arbitration, *revocable* by either party, (b) and not sufficient to oust the Courts of Law or Equity of their jurisdiction (c) A separate action might have been maintained for a breach of this agreement, (d) but it could not bar the plaintiff from proceeding in the suit then depending; neither could the Court have granted an attachment for not obeying the award entered thereupon. (e) Indeed, the failure to have the rule of Court made was an implied *revocation*.

4. The award in this case was neither *certain*, *mutual*, nor *final*. It could be *understood only* by referring to other testimony of a parol and disputable nature. It was not *mutual*; for, while it went to establish the *defendant's* claim to a credit, it did not settle the amount of the *plaintiff's* account. Neither was it *final*; for it did not dispose of the suit at all, nor settle the question of *costs*. Besides, the testimony of one of the arbitrators proved that they received the *illegal* testimony of *Stevens*, which might have influenced *one* of them, if it did not the *other*.

Botts, for the appellee. It may be collected from the record, that all the testimony, except that relative to the award, was introduced by the *plaintiff*. Suppose, therefore, the defendant's evidence *nothing*, as he demurred, yet the contradictory facts disclosed in the plaintiff's evidence were sufficient to destroy it. Probably the only witnesses who knew of his claim were those who also knew of its being satisfied by the transfer of *Holt's* bond.

It is said not to be sufficient for a demurrant to demur in the forms usually practised, but he must "distinctly ad-

mit upon the record every fact and every conclusion which the evidence offered conduces to prove!" This doctrine is indeed laid down in the single case of *Gibson & Johnson v. Hunter*,^(a) but is not conformable to the practice of this country. In *Knox v. Garland*,^(b) *Hyers v. Green*,^(c) *Hyers v. Wood*,^(d) and *Biggers v. Alderson*,^(e) the demurrers contained a statement of all the evidence on both sides, and concluded without any *distinct admission* by the defendants. The counsel observed, in the last mentioned case, "that by a demurrer to evidence the defendant not only admits the facts stated, but every rational inference which a Jury might deduce from them;" and this appears to be the correct doctrine, that such is the *effect* and *construction* of the demurrer, without any *distinct* admission. Whether the practice should be one way or the other, *might* appear a matter of no importance; but the inconvenience of establishing the rule contended for goes to the *total destruction of demurrers to evidence*. How is it possible for the demurrant to fix on the *inferences* which might be drawn from the evidence? But this, in fact, is the province of the Court, according to the case of *Stephens v. White*.^(f)

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(a) 2 H.
Black. 187.
(b) 2. Call,
241.
(c) *Ibid.* 555.
(d) *Ibid.* 574.
(e) 1 Hen. &
Munf. 54.

(f) 2 Wash.
210.

The *effect* of the demurrer then being that the defendant *impliedly* admits the truth of the plaintiff's evidence, it only follows that he admits it *such as it is*; but here the plaintiff's own evidence was contradictory, and therefore the Court could infer nothing from it in his favour.

On the *merits*, he was not entitled to a judgment; for it is not at present proved that *Holt* was *really insolvent*, and *Harrison* ought not to hold the bond against *him*, and yet come upon *Brock*; neither is *Brock* responsible for any fraud committed by *Stevens* without his privity.

I admit the plea of "arbitrament and award," in so many words, was bad; but it gave the plaintiff notice that the defendant intended to rely upon an award, and was, therefore, sufficient to let it in upon the plea of *non assumpsit*, as where there are *bad* counts and *good* counts in the same declaration, evidence may be received upon the good counts

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(a) 2 Wash.
180. *Overton*
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of facts of which the defendant had notice by the bad counts, the great object being to prevent surprise, by giving notice of the cause of action, or ground of defence, as the case may be.(a)

But, if the award was not admissible, the objection should have been taken by *bill of exceptions*. The evidence would certainly have been proper by consent of parties; and the plaintiff's not excepting was equivalent to a consent on his part.

Mr. *Munford* contends that, since the award was made after the action brought, it should have been specially pleaded. But the same objection was taken and overruled in

(b) 2 Wash.
71.

Turberville v. Self.(b) The award does not make the payment, but ascertains that there was a payment before the

(c) *Ibid.* 72.

suit.(c) It may be considered as an indirect agreement of the parties to the facts stated therein.

If the failure to make the rule of Court was a *revocation*, I wish the counsel had fixed the time when it was to be considered as such. But, in fact, the submission was never revoked; for both parties attended with their witnesses, and acquiesced in the authority of the arbitrators. Their award might and ought to have been made the judgment of the Court; the going on afterwards to trial by Jury was an error favourable to the plaintiff, and not a subject of complaint on his part.

Taking the submission and award together, every reasonable degree of *certainty* is attained. The statute of *jeofails* applies to awards by analogy; but it is not necessary here, for no other controversy between the parties is stated, and no other debt appears but that for which the suit was depending; and, as to the supposed *illegality*, the case of *Pleasants, Shore & Co. and Anderson v. Ross.*(d) shews that an award is not to be impeached on the ground of a mistake in law or fact, upon affidavits to prove it, but only where such mistake appears upon the face of the award.

(d) 1 Wash.
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Munford, in reply, said, he did not mean to contend that an *express* admission of the truth of the plaintiff's evidence was necessary in the demurrer. An *implied* admission would equally answer the purpose; but such admission *cannot* be implied where the defendant introduces evidence to contradict that of the plaintiff.

In this case, what testimony was produced on each side does not *distinctly* appear in *every part* of the demurrer; but, at any rate, the award, and the *wit-ness in support of it*, went to contradict the plaintiff's evidence. On his part, the justice of his claim *originally* had been fully proved. *Thomas Woodroof*, (the only witness who said that he had taken *Holt's bond in satisfaction*) had been completely discredited by *William Shelton*. The circumstances proved by other witnesses, particularly that after presenting the bond to *Holt* for payment, the plaintiff *immediately* returned to *Stevens*, and wished him to take it back; that, some time afterwards, he applied to the said *Stevens*, and said he *must* assign it to him; that *Holt* was believed by many to be insolvent at the time of the trade, and that *Stevens* himself believed him to be so, but told the plaintiff he expected he would get the money upon application; were amply sufficient to authorize the Jury to conclude, either that the plaintiff had not in fact received the bond *as satisfaction*, or that the trade was not binding upon him, being annulled and rendered void by the *fraud*; yet the *award* declared that the said bond *was received in payment, and ought to go (without recourse) to the extinguishment of the said debt!* This was certainly declaring that no fraud existed, and contradicting the whole current of testimony on the part of the plaintiff. The *Jury*, therefore, and not the *Court*, ought to have *weighed* the *award* compared with the other testimony, and determined which should preponderate.

The doctrine that the defendant may, in every case, by means of a demurrer, submit his evidence contradicting that of the plaintiff, to the *Court*, instead of the *Jury*, "goes to the total destruction of the trial by *Jury*," and

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would, in practice, be intolerably harassing and oppressive. It seems clear, therefore, that in this case the plaintiff should not have been compelled to join in demurrer.

As to the *merits*, the question whether *Holt* was really insolvent or not, was proper for the consideration of the Jury; but that question, through the *defendant's* fault, having been wrested from the *Jury* to the *Court*, the latter became competent to decide it *against him*. The judgment, therefore, should not be disturbed, especially as the testimony was sufficient to justify the decision. That *Brock* was *not responsible* for the fraud committed by *Stevens*, is admitted; but it is equally certain that he *cannot claim any benefit* from that fraud.

Mr. *Botts's* doctrine concerning the *notice* given by a *bad* plea, and that in consequence of such *notice*, evidence may be received upon the *good* plea, is truly original and extraordinary. I had always understood the rule to be, that such evidence as goes to support the *good* plea, or count, is admissible, but none at all in support of the *bad*.

The plaintiff *has* excepted to the *whole* demurrer to evidence, and of course to the admissibility of the *award* as part thereof. The defendant himself, by tendering the demurrer, had taken it away from the Jury; the plaintiff, therefore, excepted in the only way which was left to him.

(u) 2 Wash. 71. In the case of *Turberville v. Self*, (a) the award was not made *after the action brought*, but "after the *distress* was taken respecting accounts subsisting between the parties *prior to the distress*."

If the award could have been made the judgment of the Court, why did not the defendant bring it into Court, and move to have it entered as such? But the truth is, it was so vague and uncertain in not expressing the debt to which it was intended to apply; so incomplete in not disposing of the suit between the parties, that a judgment could not have been rendered upon it, even if every other objection had been surmounted.

Friday, March 16. The Judges pronounced their opinions.

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Judge TUCKER. Upon the original merits of this case, as disclosed by the facts stated, and admitted by the defendant in his demurrer to evidence, I cannot entertain a doubt. It appears to have been a case of fraud and imposition on the part of the defendant's agent, upon a poor, and probably ignorant, waterman, to shuffle him out of his well earned wages, by palming upon him the bond of a man whom, at the time, he believed, and probably knew, to be insolvent; and, when applied to by the plaintiff, who had endeavoured to obtain payment of the bond, to take it back, he not only refused to do so, but even went so far as *positively* to *refuse* to assign the bond to the plaintiff to enable him to bring suit upon it in his own name. These facts, and others of the same complexion, are *admitted* by the defendant to be true; he then exhibits a submission to arbitration, by the same agent in his behalf and by the plaintiff, after the suit was brought, (in which it was mutually agreed that that submission should be made a rule of the County Court of *Amherst*,) and an award made two days after, by which two of the arbitrators awarded, "that the said bond was received by the plaintiff in payment, and ought to go *without recourse* to the extinguishment of the debt." Why this submission was not made a rule of *Amherst* Court, pursuant to the terms thereof, does not appear. The plaintiff refused to join in the demurrer to evidence until overruled by the Court. The Jury assigned damages conditionally, and the County Court gave judgment in favour of the plaintiff; but that judgment was reversed by the District Court, because the County Court refused to consider the award made between the parties as final and conclusive.

It was admitted by the appellee's counsel, that the words "*arbitrament and award*," pleaded by the defendant in so many words, were a mere nullity, and must be disregarded;

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and that the cause is to be considered as having been tried on the plea of *non assumpsit* only. It is an invariable rule that every defence which cannot be specially pleaded, may be given in evidence, upon the general issue, upon the trial; but a submission to arbitration and an award might be so pleaded: of this the defendant was apprized, and probably considered the evidence offered as strictly within the issue joined. He is expressly stated to have had no personal agency, and no knowledge of the transactions of his agent, as above stated. Here, then, are two innocent persons embroiled in a lawsuit by the misconduct of the agent of one of them. A Court of Equity, with all necessary parties before it, would probably find no difficulty in adjusting matters properly. But we are now in a Court of Law, and must endeavour to do justice, as far as the nature of the case will permit, between the parties.

According to the rules of Courts of Law, the *only* issue which the Jury were sworn to try, was upon the plea of *non assumpsit*; upon *that* issue evidence of a submission to arbitration, and an award made, was not admissible, because that matter might have been specially pleaded, and ought more especially to have been so pleaded, because both the submission and award were made *after* suit brought; whereas the plea of *non assumpsit* refers to the original ground and cause of action. If the Jury had rendered a verdict for the defendant upon this evidence, and it had appeared upon the record that they did so, it would have been error. (a) Would a judgment by the Court, upon a demurrer to evidence, have been more legal or conclusive in favour of the party offering improper evidence, than the verdict of a Jury? I conceive not; for the Court, in this instance, are merely substituted for the Jury, as triors of the facts *relevant* to the issue joined; and if it shall appear that they may have been influenced by improper testimony, their judgment, (like the verdict of the Jury,) if in *favour* of the party offering the evidence, ought to be set aside; otherwise, if it be *against* that evidence; for, *then*, it is clear

(a) 2 Wash.
281. Lee v.
Tapscott.

the evidence has not had any undue influence. The judgment of the County Court was not influenced by this improper evidence; it was, therefore, I think, correct; and, consequently, the judgment of the District Court reversing that judgment ought itself to be reversed, and that of the County Court affirmed.

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Judge ROANE. In this case, (as it appears upon the demurrer to evidence,) the plaintiff having established his debt, evidence was given, on the part of the defendant, of a conversation and transaction which is relied on, in bar, as an accord and satisfaction. This was proved by one witness only, who said he was present at the time of the transaction aforesaid, and heard the *whole of the conversation*, in which, it was further proved by him, the appellant *agreed to take Holt's note* in payment. This testimony was met by testimony on the part of the appellant, stating an after acknowledgment on the part of the said witness, (*Woodroof*;) that he was *NOT present during the whole time* of the transaction aforesaid; which testimony is in conflict with the former, and goes directly to impeach the credibility of this witness, adduced on the part of the appellee. The appellee demurred to the evidence, (the whole evidence on both sides being stated,) and the appellant was ruled to join in the demurrer, although he objected thereto. It is true, the demurrer does not state explicitly what evidence was given on the part of the appellant and appellee respectively; but I infer it, as aforesaid, from the nature and effect of the testimony.

In a demurrer to evidence it has been decided that the *whole* evidence must be stated, and thereupon the judgment of the Court is to be pronounced: the question, therefore, becomes important, whether, in the case before us, the Court rightly ruled the appellant to join in demurrer. It is admitted that a discretion in this respect exists with the Court, at least in cases depending on loose or con-

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tradictory testimony; and it remains to be inquired, whether that discretion was rightly exercised in the present instance. The appellee's testimony is (as aforesaid) contradictory to, and in conflict with, that of the appellant. It is true, it is not opposed to the testimony *originally* adduced by him, but to that which came out in the *replication*, if I may be permitted so to express myself; but, on principle, that can make no difference, as *all* the testimony was given anterior to the exhibition of the demurrer. If the right of the appellee in this case to compel his adversary to join in demurrer be *absolute*, what is it but to give credit to his own witness, or, at least, to carry his *credibility* to be adjudged of by an improper tribunal? as the *Jury*, and not the *Court*, are the proper and exclusive judges of credibility. Under that idea, a defendant (and, *è converso*, a plaintiff) might ensure success in all cases by bringing a profligate witness to oppose the plaintiff's demand, and then instantly conferring credit on him by demurring to the plaintiff's testimony, and compelling him to join in demurrer; and, in *general* cases, the plaintiff might not be so fortunate as the present plaintiff, in having confronting testimony to exhibit. This would be intolerable in its consequences; and this consideration would undoubtedly afford a good reason with the Court for refusing to compel the plaintiff to join in demurrer.

In 5 Bac. 467. (*Gwill.* ed.) it is said, that "if it be alleged by one party that there is such a writ, and denied by the other, and thereupon there is a demurrer to evidence, no judgment can be given," (and therefore I infer the adverse party should not be compelled to join,) "for the being or not being such a writ, is a fact which a *Jury* should determine; but in such case the writ should be *admitted tiel quel*, and then its *effect* should be adjudged by the Court." This case seems analogous to the one before us. With respect to the difficulty, stated by Mr. *Botts*, as to the impossibility of the demurrant's knowing what inferences do exist, and are therefore to be admitted, I should be satisfied

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if, while he waives a reliance on the credibility of his witnesses, when opposed to the testimony of the party demurred to, (which he may do in *general terms*,) the drawing of the proper inferences be left to the Court. It is only substance that I am in quest of, and that is entirely attained, if my construction, while it does not confer on the Court the province of judging of *credibility*, does not take from it the power of inferring the facts admitted to be true.

As the County Court, therefore, compelled the appellant to join in demurrer in this case, without an explicit admission, on the part of the appellee, of the truth of his (the appellant's) testimony, so far as it conflicted with his own; or, which is the same thing, without a waiver of his own conflicting testimony, I am of opinion that their judgment was erroneous. As, however, the first opinion of the County Court, compelling the plaintiff to join in demurrer, was favourable to the *appellee*, though erroneous, and as their *final* judgment on the demurrer would have been *à fortiori* for the *appellant*, if the appellee's conflicting testimony had been excluded, and would, in that case, have been altogether correct, I see no reason for disturbing that judgment. It is, however, the *reversing* judgment of the District Court which the appellant complains of. That judgment is erroneous in considering the award stated in the demurrer as final and conclusive. That award was not proper evidence on the plea of *non assumpsit*. My opinion, therefore, is to reverse the judgment of the District Court, and permit that of the County Court, in favour of the appellant, (although erroneous as aforesaid,) to stand, for the reasons just mentioned, especially as the justice of the case is entirely in favour of the appellant, and he has already been compelled to encounter so much litigation.

Judge FLEMING. It appears to me that the County Court of *Amherst* erred in compelling the plaintiff to join in the demurrer to evidence, and also in permitting the award, made *pendente lite*, to go in evidence to the Jury

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on the issue joined on the plea of *non assumpsit*; but, the judgment in that Court being in favour of the appellant here, he has no cause of complaint on that account; and, as it appears from the evidence that a most palpable fraud was practised on *him* by *Stevens*, the storekeeper and agent of the *appellee*, the merits of the cause are clearly in his favour. I therefore concur in the opinion that the judgment of the District Court be reversed, and that of the County Court affirmed, which is the unanimous opinion of the Court.

Monday,
March 12.

Blair against Owles.

1. Notice of a lien or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance.

2. A purchaser, with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value.

3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff.

4. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party.

5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice.

that he bought of *Barret Price's* estate, for ten years to come;" that, soon after the death of the testator, *William Price*, administrator with the will annexed, sold his interest in the *schooner*, subject to the encumbrance upon it, to *Richard Thompson*; who, thereupon, paid the twenty pounds *per annum* for four years, but afterwards (having sold the *schooner* to *James Brown*) refused to make any farther payments; that the executors of *Barret Price* (as the complainants believed) executed a deed for the said land to *Charles Price*, in his life-time, but the deed was not recorded; that the said administrator possessed himself of the said deed, and then sold the said land to *Archibald Blair*, who knew of the said last will and testament; that, as the testator had four sons and daughters, the said *William* (as one of them) owned but a fourth part of the said land; that it was agreed on between the said *William Price* and the said *Archibald Blair*, that the deed which had been executed by the executors of *Barret Price* to the said *Charles Price*, should be returned to the said executors, and that they should execute a new deed to the said *Blair*; which the complainants believed was done to exclude them from the benefit of cutting firewood from the said land, of which the said *Archibald Blair*, after the execution of the last-mentioned deed, deprived them. They therefore prayed relief in equity, against the said *Archibald Blair* personally, or otherwise, as the Court should think proper.

As to all the defendants, except *Archibald Blair*, the suit remains undecided in the Court of Chancery. He, by his answer, admitted that he requested a friend (whose name he did not mention) to bid for the land (being fifty acres, near *Scuffletown*) in his behalf; and that it was struck out to him, as the last bidder, for sixty pounds; but averred "that, at the time of purchase, he knew of no encumbrance that the said land was under whatsoever." He farther stated "that, some time after he had purchased, *Daniel Vandewall* mentioned to him that the said land was un-

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der an encumbrance, by the will of the late *Charles Price*, to furnish firewood for a certain number of years to certain persons; that he was surprised at the information, having no knowledge that the said *Charles Price* had ever any claim to the said land; but, upon finding there was such a will, he applied to *William Price*, executor of *Barret Price*, (who sold the land,) for an explanation concerning the said will; when the said *William Price* informed him that the said *Charles Price* had no right to make such a will; that there had been a kind of a bargain with the said *Charles Price* for the land, but that the said *Charles* had never complied with the terms thereof; and the deed passed to him was incomplete, having only two witnesses, and had never been recorded; but that, as farther security and satisfaction to the respondent, *William Price*, executor, and one of the children of the said *Charles Price* would join in the conveyance to him of the said fifty acres; which he accordingly did. The respondent denied that he had any other knowledge of the plaintiffs' equity than above stated, and therefore pleaded that he was an innocent purchaser without notice, for a valuable consideration actually paid;" insisting, "that, if the plaintiffs were entitled to any compensation, they ought to recover it of those who sold, and not of him who had thus innocently acquired the land."

Annexed to this answer, and prayed to be taken as part thereof, was the deed mentioned therein from *William Price*, the elder, executor of *Barret Price*, and *William Price*, the younger, "executor," and one of the children of *Charles Price*, dated the 12th of April, 1798; in which they, "for the consideration of sixty pounds, one half to them in hand paid, and the other being secured to be paid," (without specifying by whom the public sale had been made,) jointly conveyed the said land to *Archibald Blair*, "free from the claims of all persons whatsoever."

The answer of *William Price*, jun. (among other things,) alleged, "that he knew nothing of the execution of the

deed supposed to have been made by the executor of *Barret Price*, and required that the plaintiffs should produce proof of all matters appertaining thereto; that the complainants were not born in wedlock; and that the land sold to *Archibald Blair* was sold after public notice given by the crier of the encumbrance of the firewood mentioned in the bill."

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The deposition of *William Price*, the elder, (executor of *Barret Price*,) stated, "that he was present when the land was offered for sale by the administrator of *Charles Price*, and heard the crier proclaim that there was an encumbrance of ten years' firewood on the said land; that he became the purchaser thereof in behalf of *Archibald Blair*; that, on the day the same was to be sold, he called on Mr. *Blair*, agreeable to his request, and informed him the said land was to be sold under the encumbrance before mentioned; that Mr. *Blair* informed him it was not in his power to attend the sale, but signified his desire to become the purchaser, and requested him to purchase on his behalf, limiting him as to the price; that he accordingly attended the sale, and, the land being struck off within the price limited, became the purchaser, for Mr. *Blair*, as before stated."

On the 21st of *September*, 1807, the Judge of the Superior Court of Chancery directed an issue to be tried at the bar of the said Court, on the 10th day of the then next term, "to ascertain the value of firewood which the plaintiffs were at liberty to get upon the land in the bill mentioned, for ten years from the death of the testator."

A Jury was accordingly empannelled, and returned a verdict, "that the said firewood was worth 22 dollars annually," amounting in all to 220 dollars for ten years; and the Court decreed, that the said *Archibald Blair* was liable for the value, as fixed by the Jury, for 9 years and 4 months, and that he should pay to the plaintiffs 205 dollars and 32 cents, the value of the said firewood, for the time last mentioned, according to the verdict. From that decree,

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Archibald Blair appealed, and, on the petition of the appellees addressed to this Court, the appeal was taken up out of its turn on the docket.

Williams, for the appellant, contended, 1. That *Blair* had no notice at the time of the purchase. His answer, positively denying such notice, is contradicted by one deposition only, which (being that of one of the bargainors) ought not to have been admitted as evidence.

2. The notice given him by *Vandewall*, coming from a stranger to the contract, ought not to affect him. (a) When he made inquiry into the subject, *William Price*, sen. who had sold him the land, denied the right of *Charles Price* to devise or encumber it; but, for his satisfaction, procured *William Price*, jun. the administrator, to join in the deed, in which they convey the land "*free from the claim of all persons whatsoever.*" If, then, he were considered as a purchaser with notice, the two *Prices* were bound to make good the title to him. Therefore,

3. *William Price*, sen. executor of *Barret Price*, ought to have been a party to the suit. (b) and he and *William Price*, jun. administrator of *Charles Price*, should have been decreed to pay the money, to prevent circuitry of action and future litigation; and according to the rule of equity that the Court should make him pay that ought to pay. (c) So, in a bill against a *devisee*, you must make the heir a party, upon the same principle. (d) If, however, I should be mistaken in this,

4. The decree should not have been against *Blair* personally, but against the land in his hands; for, perhaps, the land may not be worth the money. A purchaser with notice is not personally bound, but the land is bound; and on that principle the decree must be reversed.

Warden, contra. The will of *Charles Price*, recorded eight months before the purchase, was sufficient notice to all the world of the encumbrance, and especially to *Blair*,

(a) See 1
Vern. 110. 2
Ark. 51.

(c) Mist. 144.
290.

(d) 1 Willes,
51. Gawler v.
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who bought of *William Price*, the administrator with the will annexed, and could not make out his title without referring to the will; for, where a purchaser cannot make out his title but by a deed which leads him to another important fact, he must be considered conusant of it; for it is *crassa negligentia* that he sought not after it. (a) The deposition of *William Price*, sen. was admissible, because, although he joined in the deed, the land was not in fact purchased of him, but of the administrator of *Charles Price*, (as the same deposition proves,) and he was *Blair's* agent in bidding for it. A circumstance in the answer shews this: *Blair* says, that he purchased by a friend, taking care not to mention his name; now *William Price*, sen. comes forward, and says *he was that friend*.

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(a) 1 *Powell*
on *Mort.* 462.
465. 2 *Chan.*
Cas. 246. 1
Vern. 319.
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Daniel Vandewall was not a stranger, but guardian of the claimants: the notice from him was therefore good; for, though after the purchase, it was before the deed was made, and that is enough.

Nicholas, on the same side. The answer does not positively deny notice; but rather admits it by the evasive mode of denial, containing a *negative pregnant*. The notice to *William Price*, sen. by the crier at the sale, being to *Blair's* agent, was sufficient to bind him. (b)

(b) *Sugden*,
492. citing a
number of
authorities.

As to the question of parties; I admit that all parties necessary to the decision of the question should be before the Court, but not persons eventually or remotely interested, or against whom the defendant can only have a claim founded on his having been compelled to pay the money. If any person set up a claim to this land, such person ought to be a party; but the circumstance that the defendant took a writing of indemnification from *William Price*, sen. does not render it necessary to make him a party.

With respect to the object of the decree; *Blair*, being a purchaser with notice, ought to be considered as personally liable, at the election of the plaintiffs; and, in case of his inability, (which is not pretended,) the land should be lia-

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ble. The decree is not indeed in this *form*; but, being *substantially* correct, ought to be affirmed.

Saturday, March 17. The Judges pronounced their opinions.

Judge TUCKER. From the state of facts contained in the answer of the defendant, Mr. *Blair*, in the original suit, I think he was clearly a purchaser with full notice of the defendant's claim to the right of firewood from the land which he purchased. This notice he had *before* a conveyance was made to him; and, from the conveyance itself, it appears that he paid only half the purchase-money at *that* time, giving security for the payment of the other half at a future day. This brings the case fully within the authorities cited in 2 *Fonb.* b. 2. c. 6. s. 2. n. (i), s. 3. n. (m), b. 3. c. 3. s. 1. n. (b).

I am therefore of opinion that the decree should be affirmed.

Judge ROANE. I am of opinion that the decree should be affirmed. It was objected, that the executor of *Barret Price* should have been a party; but, from facts disclosed in the answer of *Blair* himself, *as well as from other testimony*, it appears clearly that he was a purchaser with notice of this encumbrance. I should have had doubts whether the *lien* should not have been confined to the land, had it not appeared that *Blair* refused to give the plaintiffs permission to enjoy the benefit of the firewood.

Judge FLEMING. There appears to have been sufficient notice, without recurring to the answer of *BLAIR*. It is the unanimous opinion of the Court, that the decree be **AFFIRMED.**

Ward against Johnston.

Tuesday,
March 6.

THIS was an action of covenant, brought by *James Johnston* against *William Long* and *William Ward*, in the County Court of *Greenbrier*. The declaration charged "that, whereas the defendants, on the 30th day of *September*, in the year 1794, at the County aforesaid, covenanted to and with the said plaintiff, under the penalty of four hundred pounds, to which they signed their names and affixed their seals, in the words and figures following, to wit: The condition of this obligation is such, that whereas the above-mentioned *William Long* hath this day bargained with and sold unto the above-mentioned *James Johnston*, a certain tract of land, lying in the County of *Greenbrier*, on the waters of *Culbertson's Creek*, formerly known by the name of *Murphy's Place*, containing three hundred and sixty-four acres, more or less; if, therefore, the above bound *William Long* and *William Ward*, his security, doth make unto the said *James Johnston*, his heirs, executors or assigns, a clear deed in fee-simple to the said tract of land, at or before the next *May* Court held for

1. Covenant (as well as debt) lies on a bond with collateral condition. If there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty: but, where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach.

2. A co-obligor, in a joint and several bond, may (though described as a security) be considered as

stipulating for the performance of the condition; the words being "if the above bound *L.*, and *W.* his security, shall, &c. then this obligation to be void," &c.

3. Where two defendants have appeared and pleaded, an entry in the record "that the parties came, &c. and the defendant *L.* acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous.

4. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other.

5. In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the Court, in reversing the judgment, ought to have given the security leave to plead *placit darrein continuance*; all the proceedings having been brought up by a writ of *superseades*.

6. Several judgments and orders, relating to each other, may be brought up by one writ of *superseades*; provided the whole be sufficiently described, as intended to be comprehended therein.

7. *Quere*, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party?

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Greenbrier County, then this obligation to be void, otherwise to remain in full force and virtue, which obligation is here shewn to the Court; and the plaintiff in fact saith, that the said defendants, although often required, did not, on or before the *May* Court thereafter the date aforesaid, nor at any time, make and deliver a deed to the plaintiff as therein mentioned, but the same *he* hath and still *do* refuse to make, to the damage of the plaintiff, four hundred pounds, and therefore he sues."

The bond exhibited was in the usual form of a *joint and several* bond, with a condition corresponding with that set forth in the declaration, except that a *proviso* was added in these words; "provided that, if default be made by the said *Long*, the said *Johnston* doth agree to take the sum of two hundred pounds like money as aforesaid, with lawful interest from this date."

The defendants *jointly pleaded* "*conditions performed;*" but, afterwards, "at a Court held on the 31st of *August*, 1797, came the parties by their attorneys, and the defendant *Long*, acknowledgeth the plaintiff's action. Therefore, it is considered by the Court, that the plaintiff recover against the said DEFENDANTS, two hundred pounds, the debt in the declaration mentioned, with interest from the 30th of *September*, 1794, and his costs," &c. Execution issued on this judgment against both defendants; and, while it was in the Sheriff's hands, to wit, on the 30th of *May*, 1798, the County Court, on the motion of *Ward*, quashed the execution as to *him*; leaving it to have its effect against *Long*. The next day two motions were made by the plaintiff; first, that the order of the preceding day, quashing so much of the execution as related to *William Ward*, be rescinded; and, (this being refused by the Court,) secondly, "to revive the proceedings as to the other defendant:" both which motions were overruled with costs, and exhibited by a bill of exceptions. On the same day last mentioned, the plaintiff farther moved the Court "to enable him to proceed to judgment against *Ward*; it appearing

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the cause as to him had *lain dormant*;" whereupon a written agreement, under the hands and seals of the defendant *Long* and the *plaintiff*, dated *August 28, 1797*, was produced by *Ward*; according to which *Long* was to appear "at *Greenbrier*, *August* quarterly term, 1797, and confess judgment in the action of debt brought against him by *James Johnston*; execution was to be *staid until the February Greenbrier Court, 1798*, at which time *Long* was to have his option *either to pay the principal and interest mentioned in the bond, or make an ample and indefeasible title to the land therein contemplated*: if he took his option to make the title, he was still to pay the whole *interest* due on the bond." A further agreement (also under seal) was endorsed, that *William Ward*, the co-obligor in the bond mentioned, was not to be *affected* by the within agreement." But *Ward* was not a party to either of those agreements. The plaintiff objected to the introduction of this paper, "as any thing whereby the opinion of the Court should be affected:" but the Court overruled his objection and motion likewise; and decided "that the judgment, as confessed by *Long*, be *final and conclusive* between the parties." The plaintiff likewise offered to shew "by *oral testimony*, that the meaning of the endorsement on the paper admitted by the Court, was not to *exonerate William Ward*, the security, but to *bar the exoneration* of him: but the Court were of opinion that no such oral testimony should be admitted." A second bill of exceptions was filed, disclosing these circumstances.

The District Court (holden at the *Sweet Springs*) granted a *supersedeas* to the judgment of *August 31st, 1797*; and, on the 21st of *October, 1800*, being of opinion "that the said judgment was erroneous in this, in considering the judgment confessed by the said *William Long* to be final and conclusive as to the other defendant *William Ward*," reversed "the said opinion and judgment of the County Court for *costs*;" and retained the cause to be tried "as to the issue between the said *James Johnston* and the defendant

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William Ward." Afterwards, to wit, on the 27th of *May*, 1802, a Jury was empannelled, and returned a verdict, " that the said *William Long* and *William Ward* had not performed the conditions of their covenants in the declaration specified;" and assessed the damages of the plaintiff to 276*l.* 13*s.* 4*d.* besides his costs. The Court thereupon entered judgment for the plaintiff " against the said *William Ward* for the damages aforesaid, and costs;" from which an appeal was taken to this Court.

Wickham, for the appellant, contended, 1. That, if all the proceedings had been regular, the judgment could not be sustained, being a regular judgment in *covenant*; for *covenant* will not lie on the *condition* of a bond, unless there be an *agreement* in the *condition* that it shall be performed. *Covenant* may lie on a bond with penalty; but the breach assigned must be for failing to pay the *penalty*, not for failing to perform the *condition*. In the condition of this bond there was no stipulation to do any act: the obligor had, therefore, his election to submit to the *penalty*. But, if *covenant* would lie, the plaintiff might lay damages as high as he pleased, and recover *more* than the penalty.

In this case, *Ward* was only a security: and it is a settled rule that, neither in law, or equity, can you recover more than the penalty from a *security*.

2. If the judgment of *August*, 1797, was *erroneous*, *Johnston* had no right to complain, since it was for his benefit.(a) But the judgment was clearly *right*, and entered against *Long* only. The defendant, *Long*, acknowledged the plaintiff's action: " *therefore* judgment was entered against the *said* defendants." Here the word "*defendants*" evidently should have been "*defendant*." The letter *s* may be rejected as surplusage; and the entry should be considered as referring to *Long* only; as in the case of *Moss v Moss's Executor*, last term. At a subsequent day, *Ward* moved to quash the execution as to *him*; because the judgment was against *Long* only. *Johnston* so considered

(a) 1 Cull, 569. *Hammett v. Bullitt's Executors.* 1 Wash. 6. *Smith v. Harmanson.*

it: for he moved to be permitted further to prosecute against *Ward*. The County and District Courts both so considered it. Indeed, it was merely a clerical error in fact, not in law, and might have been corrected by a writ of error *coram vobis*. (a) There was then no error in quashing the execution against *Ward*: it was the duty of the Court so to do. *Johnston* excepted, it is presumed, only on the ground of costs: but the Court has a right to award costs where parties are heard in an adversary way on a motion.

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(a) 2 Wash.
131. *Gordon*
v. *Frazier &*
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3. The County Court did right in refusing to reinstate the suit, and permit *Johnston* to prosecute further against *Ward*. Judgment being confessed by *Long*, and no proceedings against *Ward* for nine months, there was a complete discontinuance, and both parties were out of Court. *Ward* was in Court for the purpose of moving to quash the execution, but not as appearing to the cause. If the Court could reinstate the suit after nine months, they might at any distance of time.

A motion to reinstate a cause ought always to be on some fact *dehors* the record. Here there was no fact *dehors* the record to authorize a reinstatement. On the contrary, a written agreement between the plaintiff and *Long* was produced, shewing that *Ward*, the security, ought to be considered as exonerated. In *Croughton v. Duval*, 3 Call, 69. the authorities on this subject are collected; (b) from which it appears to be the rule in equity, (and Courts of Law are governed by the same principle,) that by giving the principal further time for payment, without the concurrence of the surety, the latter is discharged. The motion, therefore, was against the justice of the cause; and Courts of Common Law always decide motions on principles of moral right.

(b) *Misbet v.*
Smith, 2 Bra.
Chan. Cus.
579. *Rees v.*
Berrington, 2
Vesey, jun.
540. 1 Eq.
Cus. 79. ci-
ting 1 Vern.
190. See,
also, 3 Atk. 91.

4. The judgment of the District Court is altogether erroneous. The entry of proceedings is very confused; but it sufficiently appears that the *supersedeas* applied only to

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the judgment of *August*, 1797 ; (1) yet the Court reversed the decision of *May*, 1798. Thus the *supersedeas* was to *one* judgment; and *another* was reversed. There is now no judgment against *Long* upon which an execution can issue; and though the judgment was *confessed by him*, the whole is saddled upon *Ward*.(2)

Wirt, for the appellee, as to the 1st point, said, that in this case the action of *covenant* lay; and cited 6 *Viner*, 375. pl. 6. 381. pl. 21, 22. 376. pl. 4. Mr. *Wickham's* argument admits that *covenant* would lie if the condition contained an *express* stipulation: but from these authorities it appears, that an *implied* one will equally authorize the action: and here a stipulation was evidently *implied* that a title should be made to the land, or, in case of default in that, the money should be paid. *Covenant* would certainly lie against *Long* (the *principal*) upon this condition; and equally so against *Ward*, the *security*.(a) The justice of the case can as well be attained in *covenant*, as in *debt*. Besides, the defendants by their *plea* sanctioned the action; and it would now be a surprise to permit them to take advantage of this objection.

(a) 6 *Viner*,
376. pl. 4.

Both the defendants pleaded, and issues were joined. Both were then before the Court. The word "*defendants*"

(1) *Note*. The writ of *supersedeas* described it as "a judgment obtained the 31st day of *August*, 1797, by which judgment the said County Court refused to continue the suit aforesaid (which as to the said *William Ward* had lain dormant) for further proceedings, to the intent that the said *James Johnston* might obtain judgment against him the said *William Ward*, ordered that the judgment against the said *Long* should be final, and awarded the said *William Long* and *William Ward* their costs of defending the motion of the said *James Johnston*:" thus blending the several decisions, and stating them all as of *August*, 1797.

(2) *Note*. It appears from the record, that the execution (which issued against *Long* and *Ward*, and was quashed as to *Ward*) was returned by the Sheriff "*stayed by order of plaintiff*:" The date of that execution does not appear.

in the judgment of *August*, 1797, must, therefore, be considered as applying to *both*. Whenever a *supersedeas* is before the Court, the *whole* case is brought up; and the Court may look into it, and reverse for any other error as well as for that assigned in the petition. By some means, the Clerk and Counsel have *amalgamated* the proceedings of *August*, 1797, and *May*, 1798. The District Court seems to have considered them as the same; but reversed the judgment of *May*, 1798, which ought to be reversed. If the Court was right in considering the two judgments as connected together, and substantially the same, there is then no error in the judgment of the District Court. As to *Long*, the judgment of the County Court is in full force. The proceedings now in question have been against *Ward* only.

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As to the point, whether *Ward*, as security, was *exonerated*, all the cases cited were in *chancery*. There are none such at *common law*. But if notice can be taken of such a circumstance in a Court of Common Law, it must be put in issue by *plea*; not introduced by *motion*. Besides, the cases all turn on varying the contract to the *injury* of the security. A mere enlargement of time for payment is not, of itself, sufficient; but there must, in addition, be some strong circumstances of great hardship; and no such circumstances exist in this case.

Wickham, in reply. I admit, if the security wishes to be *relieved* in a Court of Common Law, it must be by *plea*: but here the question occurred on the *plaintiff's motion*, which the Court was to grant, or deny, as might be *equitable*. On all extrajudicial motions, such should be the consideration.

The proposition which I lay down is, that a *security* is bound by the *terms of the contract*, and no other: if the creditor thinks proper, by an agreement with the principal, to vary those terms in so material a part as the performance, the security is no longer bound. The cases cited by

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me are not exactly the same in all their circumstances ; but this *principle* may be extracted from them all.

Mr. Wirt misapprehended me on the subject of *covenant*. If a man *articles* to perform covenants, under a penalty, damages may be recovered to *any* amount : but on a bond with a collateral condition, (without any stipulation to perform the condition,) damages to the amount of the *penalty only* can be recovered. Is it of no consequence to the *security* that he sees the extent to which he can be bound ? *Debt*, therefore, (in which no more than the penalty can be recovered,) and not *covenant*, (in which the damages may exceed the penalty,) was the proper remedy in this case.

The declaration being bad in *substance*, was not cured by the defendant's pleading to it ; for, after pleading to a bad declaration, you may move in arrest of judgment.

The District Court erred in another respect. It reversed and annulled the judgment against *Long*, but did not direct what judgment was to be entered in lieu thereof.

Saturday, March 10. The Judges pronounced their opinions.

Judge TUCKER. 1. The first point made by Mr. *Wickham* was, that an action of covenant will not lie in this case against his client, *Ward*, as he was only a *security*, and so named in the condition of the bond, given by him and *Long*, the principal, for making a title to the lands in question : but I think the objection does not lie ; for the condition is, that the bond shall be void, if *Long*, and *Ward*, his security, make unto the plaintiff, or his heirs, &c. a clear deed in fee-simple for the lands. Now *Long* and *Ward* might have been joint-tenants, or tenants in common, or coparceners in the land ; in which case *both* must have joined in the conveyance, though *one* only had sold to the plaintiff ; and since the condition imports that something is to be done by *both* the seller and the security, (and not by either of them singly,) we must suppose it was under-

stood by the parties that something was *necessary* to be done by *both*. Therefore, an action of covenant, I conceive, well lay against *both*.

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2. Another point was, that the plaintiff, *Johnston*, having accepted a confession of judgment against *Long*, the principal, with a stay of execution, the security was thereby exonerated. How far this may be the case in a Court of *Equity*, it is not for me to say at present; but at *law*, I concur with Mr. *Wirt* that it ought to have been pleaded as a plea *puis darrein continuance*; which was not done. And, if it had been, I am not prepared to say it would have had the effect contended for by Mr. *Wickham*; but, upon this point, I give no opinion; nor is it necessary; since the terms upon which the judgment was taken do not appear upon the record, at the time of the judgment, August 31, 1797; nor at any time before. And I hold that all that was done in the County Court afterwards forms no part of the case; the writ of *supersedeas* referring expressly to the judgment rendered on that day, although the Clerk has confounded the judgment of that day, with subsequent proceedings six months after.

The entry of the judgment against *both* defendants, on the confession of *one* only, was clearly erroneous; and that error ought to have been corrected by the District Court; which, however, it has omitted to do. It is therefore incumbent upon this Court to do it. A majority of the Court I understand to be of opinion, that the District Court ought to have permitted the defendant to plead the acceptance of a confession of judgment by *Long*, with a stay of execution, as a plea *puis darrein continuance*. If he had offered to plead such a plea, I should have thought the Court ought not to have rejected it; as it might have been demurred to, and the question of law would then have been brought regularly before the Court: but I am not prepared to say that the Court erred in not giving a permission which does not appear to have been asked. I sub-

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mit, however, to the opinion of the other members of the Court, as it may be the means of settling a question of general importance by a solemn decision hereafter.

Judge ROANE. The proceedings in this case are extremely loose and irregular: but it is evident, that the judgment of *August*, 1797, against *both* defendants on the confession of *Long only*, is erroneous; and so are some of the subsequent proceedings of the County Court, which would neither permit the appellee to consider the judgment of *August*, 1797, as also extending to *Ward*, (and consequently to charge *him* by an execution,) nor permit him to go on, and get a judgment against him. I consider *all* these proceedings to have been brought up by the *superse-deas*, and that they should be reversed, (if it be necessary as to the *latter*,) and a judgment rendered against *Long only*, on his confession; retaining the cause also for trial against *Ward* in the District Court. But, as it judicially appeared to the District Court, on the bill of exceptions stated in the record, that the judgment against *Long* was in consequence of a *new* agreement to which the appellant, *Ward*, was no party, he ought to have been permitted by the District Court to avail himself of that circumstance, (if it would *legally* avail him,) and *that*, although the agreement, in fact, took effect prior to the confession of the judgment in the County Court.

I am, therefore, of opinion to reverse the judgment of *August*, 1797, rendered against both defendants; to enter one against *Long* pursuant to the agreement in his bond; and retain the cause for trial as to *Ward*, with liberty for him to change his plea, if he thinks it necessary.

Judge FLEMING. There is no difference of opinion as to the merits of the case. One Judge only doubted whether there was error in not giving the appellant leave to plead the new matter by way of plea *puis darrein continué*

ance. But a majority of the Court is in favour of the following judgment.

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The judgment of the District Court of *May 27, 1802*, is to be reversed. " And this Court is further of opinion, that there is no error in so much of the judgment of the said District Court, rendered on the day of *October*, 1800, as reverses the judgment of the County Court of *Greenbrier* of the thirty-first of *August*, 1797, in favour of the said *Johnston* against *William Long* and the said *Ward*, and retains the cause in the District Court for a trial thereof to be had between the said *Johnston* and *Ward*. But a majority of this Court is of opinion, that there is error in the said judgment of the District Court in directing the cause to be tried on the issue already joined between the said parties in the said County Court, without giving leave to the said *Ward* to plead any matter subsequent to the original plea, or such other matters, in the nature of a plea *puis darrein continuance*, as he might be advised for his further defence. And this Court is also of opinion, that there is error in the judgment of the said District Court in not proceeding to render such judgment as the said County Court ought to have given upon the confession of the plaintiff's action in that Court by the defendant *Long*. Therefore, it is further considered, that the said judgment of the District Court of the day of *October*, 1800, and also that of the County Court aforesaid, be reversed and annulled, and that the said *Johnston* recover against the said *Ward* his costs in the District Court. And further it is considered, that the said *Johnston* recover against the said *Long* the sum of two hundred pounds, with interest thereon at the rate of five *per centum per annum*, from the thirtieth day of *September*, 1794, the sum agreed on as the measure of damages between the said *Johnston* and *Long*, according to the tenor and effect of the defendant *Long's* bond to the said *Johnston*; also his costs by him expended in the prosecution of his suit in the said County Court antecedent to the confession of judgment by the said *William*

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Long. And it is ordered, that a new trial be had in the cause between the said *Johnston* and *Ward*, with leave to the said *Ward* to plead any matter subsequent to the original plea, or such other matter in the nature of a plea *puis darrein continuance*, as he may be advised for his further defence."

Mumford.
1m 56
90 652

Mumford
1m 56
109 30

Tuesday,
March 13.

Digges's Executor against Dunn's Executor.

1. A judgment at rules in the Clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term; but, if it be entered as at rules only, it is merely a clerical misprision, and therefore amendable.

2. In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term, (the variance is immaterial.

THIS was an action of debt by *Ware*, executor of *Digges*, against *Croxton*, executor of *Dunn*, in the District Court of *King* and *Queen*, on a judgment of the County Court of *Essex*. The declaration set it forth as a judgment against *William Dunn*, administrator of *William Young*, jun. deceased, rendered at *August* quarterly term, 1788, "as by the transcript of the record and proceedings thereof aforesaid here in Court produced manifestly appears." The defendant pleaded, 1. That he did not detain the debt in the declaration mentioned; 2. *No such record*; and, 3. That *William Dunn* had fully administered. The plaintiff joined issue to the *first* plea; to the *second* replied, that there *is* such record, &c. and this he is ready to verify *by a transcript* thereof; and he prays that the said *transcript* may now here be viewed and inspected, whereupon he prays judgment, &c. and demurred to the *third* plea; to which demurrer there was no joinder. At a subsequent District Court "came the parties by their attorneys, and the Clerk of *Essex* County Court appeared in Court, and produced for the inspection of the Court the original papers filed in *Essex* Court, on which the judgment in the declaration is said to be rendered, together with the minute and record books as kept by the said Clerk of *Essex*; and the Court having inspected the same, was of opinion that there

is not any such record, &c. as by the declaration is supposed." Judgment was therefore given for the defendant; from which the plaintiff appealed.

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The transcript of the record of the County Court of *Essex*, which was "*filed in this cause*," shewed that the judgment rendered there was at *Rules* in the Clerk's office, *July 22, 1798*; the defendant having failed to plead.

Randolph, for the appellant. There was no variance between the judgment declared upon and that produced. The judgment being entered at *Rules* in *July*, was properly stated as of the ensuing quarterly term, at which it might have been set aside; and such, I understand, is the uniform practice.

Wickham, contra. The transcript said to have been *filed* in the cause is not to be regarded as a part of the record; not having been made so by a bill of exceptions. That paper, then, being thrown out of the case, there is nothing to shew upon what ground the Court decided. The Clerk of *Essex* produced the original papers, the minute and record books; and the Court, upon inspecting those documents, determined that, in point of fact, there was no such record. To this decision no exception was taken; and therefore this Court should affirm it; upon the principle that every Court must be presumed to have done right till the contrary appears.

Randolph, in reply. The *transcript* in question was regularly incorporated in the proceedings by a *profert*. A bill of exceptions was therefore not necessary.

Thursday, March 29. The Judges delivered their opinions.

Judge TUCKER. *Ware*, as executor of *Digges*, brought an action of debt against *Croxton*, executor of *Dunn*, on

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(a) 1 Wash.
363.

a judgment alleged to have been obtained by him at a quarterly *session* Court, held in the County of *Essex*, in the month of *August*, 1788, against the said *Dunn*, in his life-time. The defendant pleaded *no such record* as by the declaration is supposed. The plaintiff replied that there is such a record; and this he is ready to verify by a *transcript* of that record, and prays that that may be seen and inspected by the Court: there is no *similiter* entered on the part of the defendant. This, however, was probably aided by there being a negative and affirmative in the pleadings, as in the case of *Brewer v. Tarpley*.^(a) But, at a subsequent day, "came the parties, by their attorneys, and the Clerk of *Essex* County Court appeared in Court, and produced for the inspection of the Court the original papers filed in *Essex* Court, on which the judgment in the declaration is said to be rendered, together with the *minute* and *record books*, as kept by the said Clerk of *Essex*, and the Court having inspected the same, was of opinion, that there is not any such record as by the declaration is supposed, as the defendant in pleading hath alleged," and thereupon gave judgment for the defendant, that the plaintiff take nothing by his bill, &c. from which judgment there is an appeal to this Court.

As the plaintiff did not think proper to spread the evidence upon which the Court grounded their decision upon the record, this Court must presume the judgment of the Court pronounced upon inspection of the records of the County Court of *Essex* to be correct. But, were this otherwise, the transcript of a record of a judgment entered at the *Rules of July* (were it certain that that entry was a confirmation of a formal *conditional* order, which is by no means clear in my opinion) would not *verify* a judgment had at the succeeding *August* quarterly term, as the judgment stated in the declaration is charged to have been. For these judgments MIGHT HAVE BEEN SET ASIDE at the succeeding *August* term by the defendant's appearance, and pleading to the action; and, if it were not, it was the duty

of the Clerk to have entered it as of *that* term, pursuant to the directions of the act.^(a) But it stands in the transcript inserted in this record, as a judgment entered at the *Rules in July*, instead of a judgment of the succeeding term. I am therefore of opinion the judgment should be affirmed.

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(a) 1 Rev.
Code, c. 66.
s. 42, and c.
67. s. 50

Judge ROANE. The declaration makes a profert of a transcript of a record, and proceedings containing a *judgment* rendered at the *Essex August* quarterly term; and the transcript filed in the cause is to be taken as *that* transcript: the plea is, that there is not any such record. The plaintiff replies that there is such a record, which he is ready to verify by a *transcript* of the record; and prays that that transcript may now be viewed and inspected by the Court.

This would seem to tie down the judgment of the Court to be pronounced upon the transcript thus put in issue, and make the judgment of the Court as given upon the original papers irregular and improper.^(b) The transcript thus referred to exhibits a judgment rendered at the *Essex July Rules* preceding the *August* term stated in the declaration, and corresponding in other respects with the judgment so stated; and the question is, whether this record *sufficiently* corresponds with that stated in the declaration. It was decided in *Hunt v. Wilkinson*,^(c) that an office judgment is not to be considered as a *judgment* till the ensuing quarterly term has elapsed; that is, the operation of the general law, upon a judgment given at the *Rules* at a previous term, makes it, in effect, to have been given at such quarterly term. But the question still recurs, was it necessary to state all this, circuitously, in the declaration; or would it not suffice to take the more direct course of simply stating it to be a judgment of the quarterly term? Undoubtedly the latter course is sufficient: there are many instances in the law in which it is sufficient to state the purport of a deed or document according to its legal operation. In the case before us, there is no variance between

(b) See upon
this subject
the case of
Burk v.
Tragg, 2
Wash. 215.

(c) 2 Call,
49.

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(a) 1 Rev.
Code, p. 88.
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the transcript declared on, and that produced in evidence, that is not cured and remedied by the operation of a general law; there has been no omission in the declaration which is not justified on the ground of avoiding a useless and unnecessary circuitry.

With respect to the reference in the County Court law, (a) it only refers to the District Court law as to the manner and terms of setting aside office judgments: it does not render it indispensable to the validity of an office judgment that it should be entered by the Clerk as of the last day of the term, as is provided in relation to judgments in the District Courts. There is then no misprision in not having done this in the case before us; at least none which will prevent our considering the judgment as being a judgment of the *August* quarterly term.

I am therefore of opinion that the judgment of the Court, on the plea of *nul tiel record*, is erroneous; that it ought to be reversed, and the cause remanded for further proceedings as to the two remaining pleas.

Judge FLEMING. The only question in this case is, whether there be a record of such a judgment as is stated in the declaration? The plaintiff declared on a judgment recovered, at a quarterly session Court holden in the County of *Essex*, in the month of *August*, 1788, of *William Dunn*, (B.) administrator, &c. of *William Young*, jun. deceased, as well for a debt of 400*l.* specie currency, as 210*lb.* of tobacco, and 1*s.* 6*d.* for costs. The defendant pleaded that there is not any *such* record of the recovery, &c. as by his declaration is above supposed: and the plaintiff replied, that there is *such* record of the recovery aforesaid remaining in the aforesaid Court of *Essex* County, &c. and prayed that the transcript of the said record might be viewed and inspected by the Court, &c. And, at a subsequent day, in presence of the parties, by their attorneys, the Clerk of *Essex* County Court appeared in the District Court of *King and Queen*, where the suit

was pending, and produced, for the inspection of the Court, the original papers filed in *Essex* Court, on which the judgment in the declaration is said to be rendered, together with the minute and record books, as kept by the said Clerk of *Essex*, which, to be sure, were of equal validity with a transcript of the record; and the Court, having inspected the same, was of opinion that there was not any *such* record of the recovery of the 400*l.*, 210*lb.* of tobacco, and 1*s.* 6*d.* against the said *William Dunn*, as administrator of *William Young*, deceased, as by the declaration is supposed, and gave judgment for the defendant. From which judgment the plaintiff appealed to this Court. And a transcript of the record, *inspected* by the District Court, and on which judgment for the defendant was, in my conception, very improperly rendered, is filed in this cause, and is now part of the record before the Court; on inspection whereof it appears that, at the *Rules* held in the Clerk's office of *Essex* County, on the 22d day of *July*, 1788, judgment was granted to the plaintiff *Robert Ware*, against *William Dunn*, (B.) administrator, &c. of *William Young*, deceased, for 400*l.* specie currency, for debt, and 210*lb.* of tobacco, and 1*s.* 6*d.* for costs, which is precisely the amount of the judgment stated in the declaration; but it is objected that it is there stated to have been recovered in the month of *August*, 1788, when it appears by the record to have been entered at the *Rules* in the month of *July* preceding. But let us see what the law says on the subject. By the act concerning County and Corporation Courts of 1792, c. 27. s. 29.(a) it is enacted, that where any final judgment shall be entered up in the office, &c. by default, execution may issue thereon, after the next succeeding quarterly Court, unless the same be set aside during such Court, in like manner as office judgments in the *District Courts* may be set aside. By the District Court law, c. 66. s. 42.(b) all judgments by default, &c. obtained in the office, and not set aside on some day of the next succeeding District Court, shall be entered

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(a) 1 Rev.
Code, p. 88.

(b) Ibid. p.
80.

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(a) 1 Rev.
Code, p. 92.

by the Clerk, as of the last day of the term; which judgments shall be final in actions of debt founded on any specialty, bill, or note in writing, &c. By the 69th section of the *County Court law*, the proceedings in the said Courts, in common law cases, shall, as nearly as may be, conform to the practice in the District Courts.(a)

This judgment, then, obtained at the *Rules*, in the office of *Essex County*, the 22d day of *July*, 1788, ought, according to the directions of the *law*, to have been entered by the Clerk, as of the last day of the succeeding quarterly term, which was in *August* following; because the defendant was at liberty, during all that term, to set the office judgment aside, by pleading to issue. And the Clerk, by not having so entered it, was guilty of a *misprision*, the meaning of which I take to be, a *mistake*, an *oversight*, an *omission*, or *neglect*, in entering up a record; and the failing, or neglecting, to enter the judgment before us, as of the last day of the *August quarterly term*, next succeeding the office judgment, was clearly, in my apprehension, a *misprision*; and the entry ought to have been amended, agreeably to the directions of the law; and, according to the plain construction of which, and to the decision in the

(b) 2 Call, 49. case of *Hunt v. Wilkinson*,(b) the judgment was incomplete, and in abeyance, (nor could execution have been had thereon,) until the end of the *August quarterly term* next succeeding the office judgment. The plaintiff, then, in my conception, properly stated it, in his declaration, to have been a judgment recovered in the month of *August*, 1788. I am therefore of opinion, that the judgment of the District Court is erroneous, and ought to be reversed, and the cause remanded for further proceedings.

By the majority of the Court the judgment was reversed, and the cause remanded for further proceedings on the issue, which had not been tried, and on the demurrer, as to which there was no joinder.

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Chinn against Heale.

Thursday.
March 8.

THIS was a suit in Chancery brought in the County Court of Fauquier, by William Heale against Charles Chinn, Rawleigh Chinn, and John Chinn, executors of Charles Chinn, deceased.

The object of the bill was to compel a conveyance of a tract of land sold to the plaintiff by the defendants, under the will of their testator, "as containing two hundred acres," and an additional conveyance of part of the adjoining land, (held by the defendant Charles Chinn,) to make up a deficiency of quantity in the said tract, according to an alleged agreement between the defendants and the plaintiff. It appeared from the bill, answer and exhibits, that the plaintiff held (by deed from George Heale, his father, who bought of Rawleigh Shearman) two hundred acres of land devised to the said Shearman by the will of Rawleigh Chinn, deceased; adjoining to which lay the land sold as aforesaid by the defendants to the plaintiff; being other two hundred acres devised by the same will to Bryan Stott, under whom the testator of the defendants claimed. The several devises to Rawleigh Shearman and Bryan Stott were of so many acres of land out of a larger tract in Prince William County, (afterwards Fauquier,) and not by metes and bounds. The plaintiff contended that Shearman's land was laid off for him (after Rawleigh Chinn's death) in a manner corresponding with certain lines represented in a plat and certificate of survey made by a certain James Routt by order of the Court, and in presence of the parties, as the surveyor certified; (which order was made, however, on the plaintiff's

1. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency: the only remedy for such deficiency is a proportionable compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.

2. An answer filed in the name of one of three executors (the decree being in favour of the plaintiff) not to be taken as their joint answer, notwithstanding the Clerk in the transcript of the record says that they appeared by counsel and filed their answer, and no steps were taken to compel a further answer from them.

3. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands, the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning over the party to a Court of law.

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motion *before his bill was filed*;) that a certain green line, E. F., (designated in the said plat,) divided the same from the land devised to *Bryan Stott*, which lay on the west of that line, and was bounded as described therein; according to which plat there was a deficiency of quantity in the last-mentioned tract.

The plaintiff farther alleged that a private survey, by consent of parties, and in their presence, was made before he gave his bond for the purchase-money; by which survey the dividing line was run, nearly, if not entirely, as represented by the said green line and letters E. F., and (as he conceived) was settled without the necessity of further dispute; but according to that survey the land fell short about 49 acres; that he then proposed to purchase from the defendants the land which had been devised to *Bryan Stott*, at 20s. per acre, agreeable to the said private survey; to which he was answered by the defendants that, if he would take 200 hundred acres at that price, he might have it; and the difference in quantity should be made up from the adjoining lands.

The defendant *Charles Chinn* in his answer declared he had understood that after the death of *Rawleigh Chinn* the whole *four hundred acres* above mentioned were *laid off together* in one undivided body; that he had never understood there was any division of the said land between *Shearman* and *Stott*; that he had searched several offices to find the said division, but never could; that, in a deed from *Rawleigh Downman* (who claimed under *William Downman* the purchaser from *Stott*) to *Charles Chinn*, the defendants' testator, the land devised to *Stott* was particularly described; that the boundaries therein mentioned contained two hundred acres, or rather upwards; and the defendant supposed, if there ever was a division, it must have been made according to the lines described in *that* deed. He contended that the plaintiff now had the whole title of *Shearman* and *Stott*; and if there was a deficiency in the whole quantity of *four hundred acres*, it should be made up

to him out of the residue of *Rawleigh Chinn's* tract, and not out of the estate of *Charles Chinn*. He denied that he ever agreed to make up any deficiency of the said *two hundred* acres out of his own land, or any now in his possession, averring that the bond for a conveyance referred to in the bill would show what land he was bound to convey; beyond which, he was advised he was not bound.

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The bond last mentioned, dated *September 29th, 1788*, was from *Charles Chinn, Rawleigh Chinn, and John Chinn* to the plaintiff. They bound themselves "executors of *Charles Chinn, deceased*," jointly and severally, in the penal sum of five hundred pounds; subject to a condition reciting that "whereas, at a public sale of the land belonging to the estate of said *Charles Chinn*, the said *William Heale* purchased a lot thereof containing *two hundred acres*, being the land which *Charles Chinn, deceased*, purchased of *Rawleigh Downman*, which land had been willed by *Rawleigh Chinn* to *Bryan Stott*, and by the said *Stott* sold to *William Downman*, the said *Heale* having, of this date, passed his bond for two hundred pounds, the purchase money, now if the above bound *Charles Chinn, Rawleigh Chinn, jun., and John Chinn* convey to the said *William Heale*, by good and sufficient deeds of conveyance the aforesaid land, to contain *two hundred acres*, whenever the same shall be required of them, then the above obligation to be void," &c.

Before the answer was filed, a decree *nisi* was entered against all the defendants; and at *May Court, 1796*, (the record says,) "came as well the complainant by his counsel, as the defendants by their counsel, and the said defendants filed their answer to the bill aforesaid, which said answer is in these words, to wit: The answer of *Charles Chinn, one of the defendants*, to a bill of complaint exhibited against him and others, executors of *Charles Chinn, deceased*, &c.; to which answer of the said defendant the complainant replied generally, and commissions were awarded the parties to take depositions."

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Sundry depositions were taken; partly for the purpose of endeavouring to explain the *written* contract, by *parol* testimony; and partly relating to the lines and quantity of the land sold. The plaintiff, by the deposition of a certain *William Metcalf*, substantially maintained his allegation concerning the private survey, made by consent of parties, in *September, 1788*, the day before the contract was concluded; from which survey it appeared that, after allowing him the full quantity of *two hundred acres* for *Shearman's tract*, there would remain only 146 acres in *Stott's tract*.

The County Court, on the 27th of *March, 1798*, decreed and ordered that the complainant recover of the *defendant* thirty-six three-fourth acres of land to be laid off out of his lands adjoining the complainant, and appointed commissioners to lay off the same; and, upon their report, decreed "that the *defendant* convey to the complainant by good and sufficient deeds in fee-simple the lands and premises in the bill mentioned, and in the plat and survey also mentioned, and described by the green letters E. F., &c., and the lands described in a survey made by *Charles Kemper* in this cause," (containing thirty-six three-fourth acres) "bearing date the 8th day of *June*, and referred to in the report of the commissioners of the same date, and that *they* pay to the complainant his costs." This decree was affirmed by the Superior Court of Chancery for the *Richmond District* in *May, 1804*; upon an appeal taken (as the Clerk stated in the transcript of the record) by the *defendants*; but upon bond and security given by *Charles Chinn only*; from which decree of affirmance the "*appellants*" appealed to this court.

Wickham, for the appellants. We contend there was no dividing line; and that *Heale* is not entitled to more than the quantity of land found in *Stott's tract*. But if he were, the decree is erroneous in having been entered against *one defendant only*, and subjecting him to make good the whole loss. The bill was taken for confessed as to all the

defendants: the decree *nisi* does not appear to have been served upon any of them; and *one only answered*. Without any reference to the *merits*, the decree ought therefore to be reversed. But, upon the *merits*, the plaintiff was entitled to no relief; at any rate, not to the relief afforded him. No *specific* tract of land was contracted to be substituted for *Stott's* land, in case of a deficiency: the only remedy was by a suit at common law for *damages*. An attempt is made to set up a *parol* agreement, (to make up the deficiency in land,) which, by the statute of frauds is not admissible, unless some *fraud* or mistake had been committed in drawing the *bond*. But the bill does not *charge* an agreement differing from the bond; nor, in fact, is any such *parol* agreement *proved*.

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Botts, for the appellee. One *executor*, as the answer imports, answered for all. They all appeared by counsel, and put the fate of the cause upon that answer.(a) The act of co-defendants in recognising the answer of *one*, as their own, makes it obligatory upon them.(b)

(a) 1 Wash-
379. *Barnett*
& *Woolfolk* v.
Watson & *Ur-*
quhart, 2 H.
& M. 120, 121.
Pollard v.
Cartwright.
(b) 2 H. & M.
575. *Freeland*
v. *Royall*.

The statute of frauds has nothing to do with this case. The appellee relies on the *written* contract; and *that* stipulates for *two hundred* acres, but does not mention *how* the deficiency is to be made up. In such cases, it should be *in kind*, if possible; for this is most consonant to justice, and the intention of the parties.(c)

(c) *Quemel* v.
Woodlief, 2 H.
& M. 173.
Nelson v. *Mat-*
thews, *ib.* 164.

As to the pretence that no dividing line existed, and that, in fact, there was no deficiency; the testimony sufficiently refutes it. Could it have entered into the minds of the parties that one was selling, and the other buying, an *undivided* portion of the estate?

Wickham, in reply. The answer itself is in terms that of one defendant only. The Court must, therefore, understand the expression in the record that it was the answer of "*the defendants*," as a clerical error.

The authorities referred to by Mr. *Botts* have no appli-

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cation. The case from *Washington* was of one defendant coming in, and joining in defence. In *Pollard v. Cartwright*, the husband's answer was received for himself and wife; and in *Freelands v. Royall* the answer of one joint partner "in the name of both" was deemed sufficient.

But, whether the answer was that of *all* the defendants, or of *one only*, the decree was wrong; being against the lands of *Charles Chinn individually*; and not against the lands of the estate. If it was the answer of *one* defendant only, then the decree was erroneous, because the *others* were not before the Court. If it was the answer of *all*, then the decree was erroneous, because *one only* was decreed to make satisfaction.

Equity does not require compensation in *land*. *Other land* might be worth *more*, or might be worth *less*. The contract was, that *this* tract contained two hundred acres. Therefore, in case of deficiency, compensation in *damages* should be made.

Wednesday, March 14. The Judges pronounced their opinions.

Judge TUCKER. *Charles Chinn*, by his last will and testament, (whereof he appointed his sons *Charles Chinn*, *R. Chinn* and *John Chinn*, his executors, all of whom qualified,) directed *all* his lands in the Counties of *Loudon* and *Fauquier* to be sold by them. The executors, pursuant thereto, set up at public sale a lot thereof, "containing two hundred acres, being the lands which the said *Charles Chinn*, deceased, purchased of *R. Downman*, which land had been willed by *R. Chinn* to *Bryan Stott*, and by the said *Stott* sold to *William Downman*." Of this lot the complainant *William Heale* became the purchaser, and on the 29th of *September, 1788*, passed his bond for 200*l.* the purchase money; and, on the same day, the executors above named executed their joint and several bond to the said *Heale*, reciting the premises, with condition to be void, "if the said

executors should convey to the said *Heale*, by good and sufficient deeds of conveyance, the aforesaid land, to contain two hundred acres, whenever they should be thereto required." The bill is brought for a conveyance; suggests a deficiency in the lot called *Stott's* land, and requires that the deficiency be made up out of the adjacent lands of the testator. And from an examination of the condition of the bond, as noticed above, the payment of the full sum of 200*l.* by the purchaser, and the acceptance of it by the executors, I have no doubt that, according to the spirit and intention of the sale, the plaintiff is entitled to have the full quantity of two hundred acres of land, if there were so much land in *Bryan Stott's* lot; and if not, out of any adjacent lands of the testator, which were to be sold pursuant to the directions of his will. There is, however, one or two errors in the decree of the County Court. *First*, either in proceeding to a final decree against *all* the executors by whom the land was sold, although *one* only had put in an answer, without proceeding to take the bill for confessed against the others, in a regular course; (a) or *secondly*, in decreeing the supposed deficiency to be made up by the defendant *Charles Chinn*, who alone had answered, out of *his* lands, instead of the lands of his testator, if any there were, adjoining *Bryan Stott's* lot. Which of these is the error of the Court, and which the blunder of the Clerk, it is not easy to say. In the case of *Freelands v. Royall*, (b) *one* partner answered in the name of both; and the decree was in favour of the defendants, not against them, as it is here. Nor am I perfectly satisfied with the survey made in the cause, on the motion of the plaintiff, before the defendants' appearance, and even before the plaintiff had filed his bill; more especially as there seems to be no reference, in that survey, to the testator's title deeds; in one of which, (that of *September 16, 1772*, from *R. Downman* to *Charles Chinn* the testator,) boundaries are expressed to which the survey before mentioned bears no kind of relation, that I can discover; as the answer suggests that *Charles Chinn* entered into possession and held

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(a) 1 Hen. &
Munf. 206.

(b) 2 Hen. &
Munf. 575.

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the land as long as he lived, according to those bounds, there is at least room to doubt whether the survey made, on the motion of the complainant, before the defendants were in court, and even before filing his bill, is altogether correct. I am therefore of opinion the decree was erroneous; and that the decree of the Superior Court of Chancery, affirming the same, ought *also* to be reversed, and the cause remanded to that Court for further proceedings therein to be had; with directions to make up the deficiency of two hundred acres (if *Bryan Stott's* lot shall be found not to contain that quantity) out of the adjoining lands of the *testator*, if any there be, to be laid off in the most convenient and equitable manner; but if there be no such lands adjoining which remain unsold by the executors, that a jury ought to be empannelled to assess the complainant's damages by reason of the deficiency; if it shall appear that the executors have, by their own act, put it out of their power to make up that deficiency, by disposing of the adjoining lands of their testator: if, however, there were *no such* adjoining lands of their testator, in that case the executors ought to refund to the complainant a ratable proportion of the purchase money paid by him, with interest on the same from the 29th of *September, 1788*, the date of his bond given on that account to *Levin Powel*, a creditor of the deceased *Charles Chinn*, at the request of his executors and in behalf of his estate.

Judge ROANE. The depositions in this cause, and particularly that of *William Metcalf*, prove satisfactorily, that whatever uncertainty or difference of opinion might have existed touching a line of division between the two tracts of land in question, at a prior time, the same was adjusted between the parties just before the sale by the executors; at which time the line was settled to run as from the green letters E. F. on *Routt's* survey. The residue of the tract was that sold by the executors and purchased by the complainant. It was sold by the acre; so that if it fell short of

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200 acres, the purchaser was not to give his bond for so much, or, having given it, would be entitled to an abatement in case of deficiency. Thus the matter stood as at the time of the sale, and independently of the title-bond spread upon the record, and the circumstances, detailed by Col. *Powell*, at the time of entering into the bonds. It is not admitted that those circumstances (taken even independently of the appellant's answer, and exclusively of the title-bond) would vary the result as arising from that bond only. That document, however, is to be taken as containing the final agreement of the parties, (whose previous conversations were consequently merged therein,) and as shutting out that uncertainty and danger of perjury which it was the object of the act to avoid and prevent. That bond does not bind the executors to convey 200 acres of land, but merely *the lot* of land, (which it is also proved was *alone* offered for sale,) derived from *B. Stott*, "containing 200 acres." Again, the bond stipulates for a conveyance of the "aforesaid land" (*i. e. Stott's*) "*to contain 200 acres.*" What is this, then, but a representation in the first case that this lot contains 200 acres, and in the second instance (more particularly) a covenant warranting it to contain 200 acres? This covenant makes the executors liable to make the purchaser amends in *damages*; but there is no specific and written agreement binding them to convey *any specific land*, ulterior to that contained in *Stott's* tract, much less the *identical* land decreed to be conveyed in the case before us.

With respect to the objection that the decree in this case does not extend to the executors other than *Charles Chinn*; it is expressly stated that the defendants (the two omitted ones included) appeared by their counsel and filed *their* answer; which answer, however, as set forth, is the answer of *Charles Chinn*, one of the executors. Nothing is more common or reasonable, than that the answer of one defendant should be adopted by another: if it was done in this instance, so as to bar the plaintiff of the benefit resulting from the *oath* of the other defendants, as he might have objected

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(a) 2 Hen. &
Munf. 575.

to the proceeding, and require an answer sanctioned by this solemnity, so he might waive that right and accept the answer in question. This he has done by replying generally, setting the cause for hearing, taking depositions, and failing to proceed against the other defendants for not answering in a more particular and special manner. The plaintiff has proceeded on the maxim "*quisquis potest renunciare juri pro se introducto.*" The case of *executors*, in the present instance, is stronger than that of separate individuals; for one executor is competent to bind his testator, and nothing is more common than for one of several executors to do the whole business. In the case, however, of *Freelands v.*

Royall, (a) it was held that the answer of one joint partner in the name of both should be sufficient; on the ground of the complainant's having filed a general replication and taken no steps to compel an answer from the other. That case is, perhaps, less strong than the one before us; not only in the diversity before mentioned between executors and other individuals, but because, in that case, we had only the *ipse dixit* of one partner, who styled himself the sole representative of the firm, whereas, in this case, the residue of the firm themselves (the other executors) have appeared by their attorney, and put in an answer by adoption. In the case of *Freelands*, there was not only no oath, but no answer for the other partner; whereas, in this case, there is an answer, but the solemnity of an oath has been dispensed with by the plaintiff: one circumstance, however, is common to both cases, which was the governing one in the case of *Freelands*; and that is, the acquiescence of the plaintiff. It is true, in *Freelands'* case, the junior Judge of this Court objected to the decree for want of the answer of the other partner; but both the other Judges were of a contrary opinion, and such was the judgment of the Court; and it is remarkable that no objection was taken to the answer in that case, on this ground, by the able counsel concerned in it. It is, however, not only the spirit of this decision which governs me in the present case, but the fear of overturning very many decrees,

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and opening wide the door of litigation. I believe that, unless this objection is overruled in the present instance, the consequences cannot be foreseen nor estimated; whereas, if any injury has accrued to the plaintiff, it has been produced by his own acts and acquiescence.

My opinion is, that both decrees be reversed, and compensation made to the appellee, in proportion to the quantity of land deficient, at the rate of 20s. per acre. It would be wrong to turn over the appellee to a Court of *law* to recover damages, because he was competent to come into equity to pray a *discovery*; and, *being there*, that Court should make a final end of the case, as a certain criterion presents itself whereby that compensation can be estimated.

Judge FLEMING. On a critical inspection of this record, the merits of the cause seem to be comprised within a narrow compass. I put out of view the depositions of *Welsh* and *Powell*, which go to prove a promise of *Chinn* to make up *in land* any deficiency there might be in the land sold to *Heale*, (as being clearly within the statute of frauds and perjuries,) and confine myself to the written covenant, as stated in the condition of the bond for conveying the land to the purchaser; which was sold for 200 acres, at twenty shillings *per acre*. *Heale*, at the time of the purchase, had *no other land* than that called *Stott's tract* in contemplation, nor any *idea* that he had purchased any other land; but was doubtful whether it contained the quantity of 200 acres; and refused to give his bond until it should be ascertained by actual survey. At length on *Heale's* executing a bond for 200*l.*, the purchase money, the executors of *Charles Chinn* the elder, under whose will the land was sold, executed a bond to *Heale* in the penalty of 500*l.* with a condition "that they would convey to the said *Wm. Heale*, by good and sufficient deeds of conveyance, the *aforesaid* land," (to wit, *Stott's tract*,) and covenanted "that it contained 200 acres;" but on a survey, there appeared to be a deficiency, in quantity, of 36 3-4 acres; for

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which *Heale* ought to have compensation, at the rate of twenty shillings per acre, with interest from the time his bond for the purchase money became payable. I am therefore of opinion, that the decree is erroneous in having ordered that compensation to be made out of the *land* of the defendant *Charles Chinn*, instead of a compensation in *money pro rata*, for the deficiency in the quantity of land as aforesaid.

Being doubtful whether the answer of *Charles Chinn* ought to be considered as the answer of the other defendants, I think it safest, and the most regular proceeding, to direct that it shall appear that the decree *nisi* has been served on the other defendants, before a final decree.

The following was entered as the decree of the Court.

“ This Court is of opinion that the said decree is erroneous in having affirmed the decree of the County Court of *Fauquier*, rendered the 28th day of *August*, 1798, in which said decree of the County Court there is error in this, in affirming an interlocutory decree of the said Court passed the 27th day of *March*, 1798, in which it is decreed and ordered that the complainant recover against the defendant (*Charles Chinn*) 36 3-4 acres of land, to be laid off out of *his* lands adjoining the complainant, and appointing commissioners to lay off the said quantity of land accordingly, and report their proceedings to the Court for a final decree: and in having further ordered that the said defendant convey to the complainant the land described in a survey made by *Charles Kemper* in this cause, bearing date the 8th day of *June*, and referred to in the report of the said commissioners of the same date. And a majority of this Court are further of opinion, that the said County Court erred in proceeding to a final decree in this cause before the decree *nisi* had been duly served on the defendants *Rawleigh Chinn* and *John Chinn*, and a return of the service thereof made to the said Court. Therefore, it is

decreed and ordered, that the decree aforesaid of the said Superior Court of Chancery be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this Court proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, it is further decreed and ordered, that the decrees aforesaid of the said County Court of the 27th day of *March*, and the 28th day of *August*, 1798, be also reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal in the said Superior Court of Chancery. And it is ordered, that the cause be remanded to the said Superior Court of Chancery to be remitted to the County Court aforesaid for further proceedings to be had against the executors of *Charles Chinn*, deceased, who have not answered the complainant's bill; and that, at a final hearing of the cause, (unless the executors shew good cause to the contrary,) a compensation *in money* be made to the said complainant, at the rate of twenty shillings per acre, for the deficiency of 36 3-4 acres of land, with interest thereon from the 29th day of *September*, 1788, until payment."

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Meredith's Administratrix against Duval.

1. In debt on a bond, if the defendant cravesoyer, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond; and though the plaintiff declare against one of several obligors, *without stating that they were severally bound*; yet, if the bond appear to be joint and several, it is sufficient.

ANNE MEREDITH, administratrix of *John Meredith*, deceased, who was assignee of *John Cunningham*, (being herself assignee of *William Foushee*, formerly Sheriff of *Henrico County*,) brought, in the *Richmond District Court*, an action of debt upon a prison-bonds bond against *William Duval*, one of the sureties of *Daniel Duval*.

The declaration described the bond as "a bill obligatory, sealed with the seals of the defendant and *Daniel & Philip Duval*, whereby they acknowledged themselves" (not saying jointly and severally) "to be held and firmly bound to *William Foushee*, Sheriff of the said County." It then proceeded to set forth the condition, and the breach by *Daniel Duval's* departing the bounds, on the 1st day of *September*, 1790, "without being discharged by due course of law;"

2. An assignment, made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act.

3. A debtor within the prison rules is still a true prisoner in the eye of the law; and, as such, should be transferred by the Sheriff to his successor in office.

4. A bond for keeping the prison rules should be taken to the Sheriff for the time being, and his successors in office; not his executors, administrators or assigns."

5. But such bond, though taken to the Sheriff, as such, and to "his executors, administrators, or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it.

6. *Quere*, Can such a bond, so taken, be assigned to the creditor by the succeeding Sheriff?

7. The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees: but the Sheriff cannot legally discharge him, unless he be actually insolvent, and, being so, the plaintiff having notice thereof, refused to pay his fees, or to give bond for the payment thereof.

8. If the prisoner depart from the rules by an illegal discharge from the Sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the Sheriff.

9. In an action on such bond, the plaintiff is only required to shew a departure from the rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law.

and, lastly, the assignment of the bond, on the 1st of *March*, 1790, "by the said *William Foushee*, formerly Sheriff as aforesaid, to the plaintiff, whereby, an action accrued to her to demand of the said *William Duval*," (who alone was sued, notwithstanding there were two other obligors) the penalty of the said bond, &c.

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The defendant craved *oyer* of the bond, and pleaded conditions performed. By the copy of the bond, thus spread upon the record, it appeared a *joint and several* bond, taken to *Foushee*, as *Sheriff*, but payable to him, "his certain attorney, his executors, administrators or assigns;" not saying his "*successors*" in office. The assignment, endorsed on the bond, is dated *March 1*, 1796.

The Jury found a special verdict, the most material facts in which were, that, after executing the said bond, *Daniel Duval* had the benefit of the prison rules, and resided not in the prison, but in a house which he had *rented* (within the bounds) of a certain *John Henry*; but the rent was never paid; that *Isaac Younghusband* succeeded *Foushee* as Sheriff, and, at a Court held for *Henrico* County the 1st of *February*, 1790, received an assignment from the said *Foushee* of the prisoners in his custody, which was entered of record, and found by the Jury in *hæc verba*; (in which assignment *Daniel Duval* was mentioned as one of the said prisoners at the suit of *Anne Meredith*, and the sum, with which he was charged, was set forth;) that the said *Duval* was then within the prison rules, and not residing within the prison; that he never was actually in the custody of the said *Younghusband*, any otherwise than the law might imply, by reason of his being within the rules, and by force of the said assignment; that *Younghusband* required security for the prison fees from the plaintiff; "that the plaintiff had before given bond and security for the prison fees to *William Foushee*, the former Sheriff;" which bond was found at large in *hæc verba*, bearing date the 10th day of *June*, 1789, payable to him as Sheriff, his certain attorney, his heirs, &c.; not mentioning his *successors*; and that he objected thereto

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on account of the securities' not being within the County; that on the 3d day of *February*, 1790, the said *Isaac Young*-husband, being Sheriff of the County aforesaid, discharged the said *Daniel Duval* from the prison bounds for want of security for prison fees, by a writing found also in *hæc verba*; "that the said *Daniel Duval* on the day aforesaid went at large out of the prison rules with the knowledge and consent of the said *Young*husband, and without the consent of the plaintiff, and ever afterwards went at large out of the said prison rules; that he knew that the Sheriff's reason for discharging him was the nonpayment of the prison fees; that the plaintiff did not reside in the County of *Henrico*, either at the time of delivering the said execution to *Foushee*, or at the time of the discharge; nor name any person resident in the said County of where the said execution was to be levied, for poses expressed in the act 10 *Geo. III. c. 3. s. 13.*"

But it was not found that notice was given to the to give security for the prison fees, or that she failed.

(a) See act of 80. (a)
1772, c. 13. s.
1. *Ch. Rev.*
2A.

The District Court, upon this special verdict, gave ment for the defendant; and the plaintiff appealed to this Court.

This case was argued at *June* term, 1807, by *Bennett Taylor* and *Williams*, for the appellant, and *Warden* and *Call*, for the appellee; and again, at *October* term, 1809, by *Williams* and *Wickham*, for the appellant, and *Nicholas*, *Warden*, *Call*, and *Randolph*, for the appellee: but, as all the points in the case are so fully considered by the Judges in the following opinions, a just regard for brevity compels the reporter to omit the arguments of counsel.

Thursday, March 15, 1810. The Judges pronounced their opinions.

Judge TUCKER. (After stating the case as above.) One

of the exceptions taken to the declaration by Mr. Williams, that the bond is therein called a *bill* obliging a successor to a special purpose, I doubt whether it would have availed him on a special plea, even if there had not been a recital in the declaration, of the condition: his second objection, that it was not alleged that the parties bound themselves jointly and severally, appeared to me to have much more weight, *William Duval* being sued *alone*: but Mr. Williams satisfied me upon that point: that, after *oyer*, the bond becomes part of the record, and the court must judge upon the whole record, 5 *Gwill. Bac.* (tit. *Oyer*,) p. 438. citing 3 *Salk.* 119. *Hob.* 217. *Show. Cas. Parl.* 221. *Carth.* 513., says it becomes part of the declaration, and is not part of the plea. In *Leftwich v. Berkely*, (a) the Court took notice of the bond as part of the record, though no *oyer* was demanded: but the error there also appeared in the declaration; so that I lay no stress upon that case as to this point. Now here, by the *oyer*, it appears the bond was *several* as well as *joint*; and therefore, according to the principles established in that case, as well as in *Berkely v. Boxley*, (b) the suit might be maintained against either of the obligors *alone*, or against the whole *jointly*. The third objection made by Mr. Warden applies to the recital of the bond, and not to the refusal of payment, as alleged in the declaration, and is therefore unimportant. The fourth is contrary to my understanding of the record; since I can perceive a clear breach of the condition from the tenor of the verdict.

Mr. Call's objections appeared to me entitled to consideration. I doubted with him whether the bond, not being payable to the Sheriff and his successors in office, was in due form; but there is no form prescribed by the statute; and, as the statute gives the Sheriff a special power to assign the bond to the creditor, which has been done in this case, the assignment was sufficient to enable the plaintiff to sue upon it in her own name. Had not this been the case,

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(a) 1 Hen. &
Munf. 61.

(b) October
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Virg. 1794, c.
76. s. 26.

on account scarcely have doubted whether a court could have that on the error in the date of the assignment in the husband's being truly found in the special verdict. (a) The reason given why the bond should have been taken to the Sheriff and his successors, and delivered to the succeeding Sheriff, that he may have notice that the party was entitled to the benefit of the prison bounds, seems inapplicable to the present case; for *Younge* has shewn under his hand and seal, that he knew *Duval* was entitled to them: having expressly so stated it in the instrument of discharge. Nor can I agree with Mr. *Call*, that the bond was taken for the benefit of the Sheriff, or for his indemnification: the recital in the act shews it to be for the benefit of the prisoner, whose health might suffer by a close confinement.

Upon the merits of this case I have never felt the smallest doubt, except as it has been excited by a difference of opinion from the Judges who pronounced the judgment in the District Court, and from those, with whom I have the misfortune to differ in opinion, in this Court. A prisoner who gives security for the prison bounds, is from thenceforward no otherwise in the custody of the Sheriff, than as may be sufficient to protect the Sheriff against any suit which the creditor may bring against him for not confining the debtor *within the walls* of the prison. He is in the eye and contemplation of the law, a *true prisoner*; being, as was said in the case of *Lysle v. Stephenson*, (b) in the *custody of the law*: but the Sheriff hath no longer any power over him, either to *restrain* him, or to *discharge* him, if he reside not within the prison. If the prisoner should depart from the bounds within view of the Sheriff, he must apply for an *escape warrant* before he can retake him; and this he is required to do *immediately*; and, moreover, *immediately* to give notice to the creditor or his attorney, or agent, and to assign over the prison-bounds bond. A neglect in either of these particulars will render the Sheriff himself liable; but nothing else will, unless the security to the bond shall

(b) *April*
term, 1806.
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afterwards be found to have been insufficient to pay the acts when the bond was taken.

I have carefully examined the acts of assembly to purpose ver what fees a gaoler would have a right to demand, it is prisoner within the prison bounds; and I can find none except the fee of 1s. 6d.* per day for maintaining him in diet. Now, according to the principles established in the case of *Rose v. Shore*, 1 Call, 540. it ought to have been averred and proved that *Duval* was unable to pay that fee, before the sheriff could have a right to demand it from the creditor; à fortiori, it is equally necessary that that fact should be established, before the Sheriff could be authorized to discharge him out of his custody, and thereby deprive the creditor of the satisfaction which the law allowed him for his debt. I will go further; it being found in this case that *Daniel Duval* did, himself, rent a house within the prison bounds, and reside therein, and that he did not reside in the prison, the presumption (if any presumption were to be made) is, that he maintained himself: if, in fact, the gaoler had found him in victuals, it ought to have been so found in the verdict; and it ought, moreover, to have been found that he was unable to pay the gaoler the legal fee for so doing, and, without such finding, the creditor could not in this case be made liable to the Sheriff for it. If any presumption arises from this special verdict, it is, that *Duval* was able to pay his prison fees, since he had credit enough to hire a house within the prison bounds, although he never in fact paid any rent for it.

In whatever point of view I consider this case, the instrument of discharge has always appeared to me not to be a discharge by due course of law: and the voluntary departure of Mr. *Duval* from the prison bounds, (within which he actually rented and occupied a house for his accommo-

* Note. But see 1 Rev. Code, c. 213. p. 368, 369. where the Courts are authorized to fix the fees of gaolers for the diet of prisoners, either committed for debt, or at the suit of the commonwealth; provided, that the allowance shall not exceed 34 cents per day.

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on account, instead of being shut up within the walls of the prison that on *her* colour of that discharge, was a breach of the husband's of the bond, as much as if he had departed with the wife. I am consequently of opinion, that the judgment ought to be reversed, and entered for the plaintiff.

Judge ROANE. There are some preliminary objections in this case, which it will be first necessary to dispose of.

It is objected that this is an action against *one* of three obligors, on a bond, which, as described in the declaration is only a *joint* bond. The answer is, that this defect is cured by *oyer*, which has incorporated into the declaration bond which is *joint* and *several*.

Again it is said, that the plaintiff's case is imperfect in this, that the departure by *D. Duval* is *stated* to have been on the 1st of *September*, 1790, and the assignment by *W. F.* on the 1st of *March*, 1790; so that it would seem that no breach had taken place at the time of the assignment to the appellant. The answer is, that this, in relation to the last date, is evidently an error arising from copying the figure 0 into the declaration, by mistake, instead of the figure 6. This is evident from the last date being stated to have been "*afterwards*," in relation to the first. But what is a more complete answer is, that the assignment itself on the back of the bond, is exhibited upon *oyer*, together with the bond; and is also *found* in the special verdict, and, in both instances, the assignment is shewn to have been made on the 1st of *March*, 1796; so that, whether we consider the case upon the declaration only, as aided by *oyer*, or on the special verdict merely, the assignment appears to have been long posterior to the breach.

To consider the merits: I have no doubt but that the creditor of an *insolvent* prisoner, who has the liberty of the rules, is as much bound to give security for the prison fees, as the creditor of one in close gaol. This ~~was~~ decided in the case of *Rose v. Shore*, (a) and is evident upon a general view of the law on this subject. Again, a prisoner of the

(a) *Call*, 540.

former description, is equally within the meaning of the acts authorizing a transfer of prisoners by a preceding to a succeeding Sheriff. He is equally a prisoner as to the purpose aforesaid, though, after giving a bond to keep the rules, it is lawful for the Sheriff (in favour of the prisoner's health) "to

mit him to go out of the prison and return at his pleasure."

(a) This idea, of his remaining still a prisoner as to purpose of a transfer, is not destroyed by the change of Sheriff's duty and liability in the event of an escape.

change was rendered necessary by the liberty of the thus granted, but does not render him the less a "true prisoner," in the language of the act upon this subject. The taken by the Sheriff, for keeping the rules, is as much a muniment of safety in behalf of the creditor, as the keys of the gaol are in relation to a prisoner in close custody; and, when legally taken according to the provisions of the act, would seem to me as much to devolve on a succeeding Sheriff, at the expiration of the preceding Sheriff's term of office, as the keys themselves; and this, although the act of 1764, c. 6. s. 1. makes it the duty of the Sheriff to assign over the bond "by him" taken: this word "him" (which in this place is used in the general) is inadequate to exclude the succeeding Sheriff from the power to assign the bond under the force of the foregoing principles. The bond devolves on the succeeding Sheriff on two grounds; 1st. For his own sake, in order to enable him to protect himself against the creditor, by the assignment of it in the event of an escape; and, 2dly. In behalf of the creditor, as that, before the act of 1795, was the only mean of his deducing a regular assignment of it to himself.

Prior to the act of 1795, allowing the assignment of bonds with collateral conditions, this was the only mean by which a creditor could obtain an assignment of a prison-bonds bond; and this, possibly, may still be the case in relation to bonds duly taken under the act, payable to the Sheriff for the time being, and his successors. In relation to them, it might be argued that the power of the preceding Sheriff

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(a) *Laws of
Virginia*, ed.
of 1769, p. 196.
s. 21.

action, in
which the
condition
of the
bond is
material.

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over them ceased with the transfer of the prisoners to whom they relate, and whom they should accompany into the hands of the succeeding Sheriff. It is true the act authorizing bonds of this description is silent, not only as to the *capacity* in which it is to be given to the obligee, but also as to the party who is to be that obligee: but it results from all the foregoing considerations, that it ought to be taken payable to the Sheriff for the time being, and his successors in office.

But the bond before us is not made payable to the "successors" of *William Foushee*. It is made payable to *William Foushee*, Sheriff of *Henrico*, "his certain attorney, his executors, administrators and assigns." While these last words in the *solvendum* of the bond are controlled by those of the *teneri*, which only mention "*William Foushee*, Sheriff of *Henrico*," on the authority of the case of *Wilkinson v.*

(a) *1 Call*, 50. *M^r Lochlin*, (a) and denote it to be a *public* bond, not a *private* one to enure to *William Foushee's* executors; this circumstance is nevertheless conclusive to show that the "successors" of the Sheriff were not intended to be embraced thereby: and, therefore, in deciding this case, it is not necessary to say that a bond given to a Sheriff simply, without words of limitation or restriction, does not enure to his successor, in the same manner as if his successors had been expressly named. This is a point on which I have formed no conclusive opinion: but this I say, that this bond being evidently a prison-bonds bond, and not a private bond, although it is defective in the foregoing particular, so as to intercept the power of the succeeding Sheriff, may still be sued upon by the creditor as at common law, since the commencement of the act of 1795, allowing the assignment of bonds with collateral conditions; and that there is nothing in the declaration tying down this proceeding to the act allowing assignments of bonds for the rules: the averment in the declaration may equally be taken to relate to the act of 1795, before mentioned.

It is here to be remarked, that the act of 1795 took effect

from the 1st of *March*, 1796, inclusive, on which day the assignment in question was made. As, therefore, the assignment was made *after* the commencement of the act, although the bond bore date before, I infer that the action upon the assignment is sustainable. I infer this on the authority of the decision of this Court in the case of *Craig v. Craig*.(a) (a) 1 Call, 484.

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In that case the suit was brought upon a bond dated in 1792, and the judgment was reversed because "the bond was not assignable *at the time* the suit was commenced." I infer that it was no objection to the action in that case, that the bond was anterior, if the assignment had been posterior to the commencement in operation of the act of 1795. Such a construction does not invade any vested right; for, while that act changes the remedy by giving a more direct recourse against the debtor, it neither affects nor increases his liability, nor prejudices the interests of the succeeding Sheriff.

With respect to the excuse set up in the case before us, the plaintiff has shewn every thing necessary on her part. She has exhibited the bond conditioned for keeping the rules, and shewn a departure therefrom. The defendant can only absolve himself by shewing that the prisoner was discharged by due course of law, or, in other words, was *legally* discharged. This necessarily involves the legality of the acts and proceedings of the Sheriff; and it is no novelty for one man to engage for the correct conduct of another. It was sufficient for the creditor, after having shewn what is before mentioned, to remain entirely passive. It was also incumbent on the defendant to shew that the prisoner was "*insolvent*," and that, being so, the plaintiff had refused to pay his fees, or give bond for the payment thereof. All these positions are entirely settled by the case of *Rose v. Shore*.(a)

(a) 1 Call, 543.

Upon the whole matter, I am of opinion that, though this particular case may bear hard on the present appellee, yet that the condition of the bond has not been kept, and that the appellant, by a reversal of the judgment of the District Court, should be enabled to recover her debt.

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Judge FLEMING. Differing in opinion, in this important case, from a majority of the Court, I have taken a comprehensive view of the subject, and hope to be excused for taking more time than usual, in stating the grounds of my opinion.

The great question seems to be whether *Daniel Duval* (the principal obligor in the bond on which the suit was instituted) was discharged out of custody by due course of law? And this question may be considered under two distinct heads. *First*, whether *Isaac Younghusband*, into whose custody the prisoner was delivered over by *William Foushee*, a former Sheriff, had a right by law to discharge him, on the creditor's failing to give security for the prison fees? and if not,

Secondly, whether the written discharge of the prisoner, by the Sheriff, did not exonerate the securities from the penalty of the bond, given for his keeping within the prison rules; and leave the creditor to her remedy against the Sheriff only.

In order to decide the first point, it may not be amiss to take a short view of the several acts of assembly so far as they apply to the case before us.

By the act of 1748, c. 4. s. 31. the justices of every county are required to mark, and lay out, the bounds and rules of their respective county prisons, not exceeding ten acres adjoining such prison; and every prisoner committed on civil process, giving good security to keep within the said rules, shall have liberty to walk therein; and keeping continually within the said bounds, *shall be judged in law a true prisoner*. By the act of 1764, c. 6. s. 3. it is enacted that the prison bounds shall not contain less than five acres.

By the act of 1748, c. 8. s. 28. it is provided that the prison fees of insolvent debtors be paid by the counties for the first 20 days, and afterwards by the creditors.

I conceive that *Daniel Duval*, after having executed the bond for keeping within the prison rules, stood precisely

in the same situation (as far as it can affect this controversy) as if he had been confined in the debtor's room of the county gaol; the place and extent of his confinement being only changed by the lenity and humanity of the law, as extended to all unfortunate debtors. But in the argument, it was contended by the appellant's counsel, that, after the bond was given for keeping the prison bounds, the prisoner was out of the jurisdiction, or control, of the Sheriff, who had no further concern or right to meddle with him; but it is presumed that this part of the argument would have been omitted, had the counsel either adverted to the reason of the case, or to the law itself, which says that "*such person shall be judged in law a true prisoner;*" and, if not the prisoner of the Sheriff, they should have explained to the Court whose prisoner he then became, and on what conditions, and by whom, he could have been *legally* discharged out of custody. The creditor neither resided, nor had an agent, in the county.

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The counsel indeed say, that "on *Duval's* having given bond to keep within the prison rules, he became the prisoner of the law, and the Sheriff had nothing further to do with him: but can the law execute itself? must it not have an agent or ministerial officer, to execute it? can it feed an insolvent debtor, unable to purchase an ounce of food to sustain life, without an active agent to procure it for him? And who, let me ask, is the agent or ministerial officer of the law on such occasions, but the Sheriff?

By the act of 1748, c. 6. s. 16. it is enacted that "the delivery of prisoners by indenture between the old sheriff and the new, as practised in *England*, or the entering upon record in the County Court, the names of the several prisoners, and causes of their commitment, delivered over to the new Sheriff (the mode pursued in the case before us) shall be sufficient to discharge the late Sheriff from all suits or actions, for any escape that shall happen afterwards:" and after the transfer in this case, (remaining on the records of *Henrico* County Court,) in which it is stated that

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Daniel Duval was a prisoner at the suit of *Anne Meredith, administratrix of John Meredith, deceased*, for the quantity of 40,914 lb. crop tobacco including interest, &c; and also 400 lb. of gross tobacco, and 3 shillings for costs in the General Court, which was a sufficient description of the cause of his commitment, as required by law. *Duval* was as much the prisoner of *Younghusband* as he had before been of the preceding Sheriff. Could there ever have been a doubt as to the debtor being the prisoner of the Sheriff, it appears to me that it must have been removed by a fair construction of the act of 1764, c. 6. s. 1., wherein it is enacted that, when any prisoner shall escape out of the prison rules, the Sheriff of the County where such prisoner was in custody shall apply to a justice for an escape warrant, to retake such prisoner, and immediately to give notice to the creditor, his attorney or agent; and to assign over, and deliver the bond taken for the prison rules. If such prisoner be retaken on the escape warrant, it would be the duty of the Sheriff to commit him to close prison, and the assignment of the bond, directed, is to enable the creditor to bring an action for a breach of the condition.

And with respect to the prison fees, the laws make no distinction between those who are in close confinement, and those who have liberty of the bounds.

By the *position* of the appellant's counsel, the prisoner could not have been discharged, had he tendered to the Sheriff the full amount of the debt and costs—and why? because, say they, “after the prisoner had given bond for keeping within the prison rules, the Sheriff could have no further concern with him.” And who, let me ask, but the Sheriff, who has the execution in his pocket, or returned it to the office, is to know when its full amount is tendered by the prisoner? The creditor is without an agent and out of the county, nobody knows where!

By an act of 1764, c. 6. s. 10. it is enacted that, where the debtor shall have remained in execution twenty days, it shall be lawful for the Sheriff or gaoler to give notice to the

attorney who prosecuted the suit, and to demand security of him for the prison fees that shall arise after the expiration of 20 days, and, if he shall fail or refuse to give such security, then to discharge such prisoner out of custody. And, by an act passed in 1769, c. 3. s. 13., after reciting that it is unreasonable for Sheriffs to go out of their Counties to give notice to creditors, at whose suit any person may be in custody of such Sheriff, or to pay money levied by executions, it is enacted, that such creditor shall name some person resident in the County where such execution is to be levied, to be his or her agent, &c.; and, in case of failure in appointing such agent, the Sheriff shall not be obliged to give notice previous to the discharge of such prisoner, either for want of security for his prison fees, or upon his taking the oath of an insolvent debtor; *but such prisoner may be discharged in those cases respectively without any notice being given to the creditor.*

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It was under this act that *Younghusband*, (then Sheriff of *Henrico* county,) in *February*, 1790, discharged the prisoner *Daniel Duval*; because the creditor had appointed no agent within the County to whom he could have given notice of the prisoner's being in his custody; and of whom he might have demanded security for the prison fees; the Sheriff, under those circumstances, standing precisely in the same situation in which he would have been, had he given actual notice to the creditor who had refused or neglected to give the security required by law.

As to the bond, found by the verdict to have been executed by *Mrs. Meredith*, the creditor, and rejected by the former Sheriff, because the security was not a resident of the County, *Younghusband* could not be affected by it, being (for any thing that appears to the contrary) without his knowledge, and was executed and payable to the former Sheriff (*Foushee*) before the debtor became *Younghusband's* prisoner.

By the act of 1772, c. 13. s. 1., so much of the act of 1748, as directs the prison fees of insolvent debtors for the

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first 20 days to be paid by the Counties; is repealed, and the Sheriff or gaoler may demand and receive of the creditor all such fees as become due until the creditor shall release such prisoner; and if the creditor, upon notice to him or her, his or her agent or attorney, shall refuse to give security to the Sheriff or gaoler for the payment of such prison fees, or shall fail to pay the same, when demanded, *it shall be lawful for such Sheriff or gaoler to discharge such debtor out of prison.*

Thus stood the several acts of assembly on this subject prior to the revolution, so far as they apply to the case now before us; holding up the idea throughout, according to my conception, that the creditor, in every case, was to stand between the Sheriff and insolvent prisoner, with respect to the prison fees.

In the act of *October, 1777*, for establishing a *General Court*, c. 17. s. 72. it is enacted that the keeping of the *public gaol* shall constantly attend the *General Court*, and execute the commands of the Court from time to time; and take or receive into his custody all persons by *the Court* to him committed on original or mesne process, or in execution in any civil suit, or for any contempt of *the Court*, and him or them safely keep until thence discharged by due course of law; but where such prisoner is so poor as not to be able to subsist him or herself, in prison, the gaoler shall be allowed *by the public* one shilling per day for the maintenance of every such poor prisoner, &c. The same clause with a little variation is re-enacted in the act of 1788 for the establishing District Courts, s. 98., and retained in the act of 1792, except that in the latter 17 cents, instead of one shilling, per day, is allowed for the maintenance of every such poor prisoner.

Why the law made a distinction between those imprisoned by order of the General Court and by process of the District Courts and others, seems immaterial to be considered here, as the case now before us cannot be affected by it.

From this view of our different acts of assembly on the subject, one general system seems to have been formed; and, taking the whole together, I must give them such a construction as appears to me most consonant to reason, and to the views of the respective legislatures, at the different periods when they were enacted; and that they may not clash one with another. One general principle seems to pervade the whole, that every person imprisoned for debt shall, *if able*, bear the charges of his or her maintenance; and if not, that the creditor, at whose suit such person may be in confinement, (except in the cases just above noticed,) shall be responsible, and *immediately* give security to the Sheriff, or gaoler, for the prison fees, *or submit to the discharge of the debtor.*

And here a difficulty, and a difference in opinion seems to arise, respecting the true and just construction of the law; how, and at what time, the inability of the debtor to pay the fees, or to maintain him or herself in prison, must appear, before the creditor can be made answerable for them, or be compelled to give security for their payment. It is contended, however, that it is incumbent on the Sheriff to ascertain, and prove, the insolvency before he can legally call on the creditor for security; but, in my conception, neither the *letter*, *spirit*, nor *reason* of the law, warrants such construction; which, besides the delay, would often involve the unfortunate prisoner in still deeper distress: and who, let me ask, is the most likely to be acquainted with the circumstances of the debtor, one who had dealings with, and trusted him for the amount of the debt; or the Sheriff, who, perhaps, never saw or heard of him till a process was put into his hands; which has been the case, in numberless instances; as many of the insolvent debtors are fugitives from their creditors; and, if there must be a risk, or a loss, to one or the other, the *law*, and, in my conception, reason and justice, all declare it ought to fall on him who imprudently trusted the debtor beyond his ability to pay. And this is no hardship on the unwary creditor, as the law provides that, if such insolvent debtor shall afterwards ac-

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quire property, he shall still have his remedy against him for the prison fees. Should a contrary construction of the law prevail, which should oblige the Sheriff to prove actual insolvency before he could demand security of the creditor for the prison fees, it will, in my apprehension, render the acts of 1764, 1769, and 1772, which form a regular system, almost nugatory, and so many dead letters; and be productive of much litigation, great injustice to Sheriffs, and further distress to many unfortunate debtors.

In what manner, and before what tribunal, it may be asked, is a Sheriff to prove the insolvency of an imprisoned debtor to the satisfaction of the creditor, before he can legally demand of him the security required by law, which, since the act of 1772, gives the Sheriff a right to demand such security, the moment the debtor is committed to prison?

From the general tenor of those acts, it appears to me that the legislature justly presumed, (until the contrary should appear, as in the case of *Rose* and *Shore*, to be further noticed hereafter,) that every person confined in gaol for debt was unable to pay the prison fees; and the proof of solvency ought to be on the creditor: 1st, Because he is the occasion of the debtor's being confined, which is supposed to be for his own benefit; in consequence of which the law calls upon him *immediately* to give security for the prison fees; 2dly. Because an affirmative is more easily proved than a negative; and, 3dly. Because the Sheriff, being an executive officer, is obliged to execute all legal process put into his hands by the creditor; and whose commissions upon executions for small sums, where the debtors are imprisoned, are very inadequate to his services; and therefore ought not to be delayed, run any risk, or put to extraordinary trouble without due compensation.

The case of *Rose* and *Shore* has been much relied on, as decisive in favour of the appellant here; but in my conception it is the reverse; as the case appears to be essentially different.

A Mr. *Glaiborne* was imprisoned for debt, within the

bounds, at the suit of *Shore*; who, agreeably to the requisition of the law, upon a presumption that *Claiborne* was insolvent, gave bond as usual, to *Rose*, the gaoler, for the prison fees; who, from time to time received them from *Shore*, at 1s. 3d. per day for upwards of 15 months. *Shore* having afterwards discovered that *Claiborne* was possessed of a considerable estate, brought an action of *assumpsit* against *Rose* for so much money had and received to his use. On the trial there was a special verdict, in which the Jury expressly found "that *Claiborne* was, during all that time, possessed of sufficient property, and able to maintain himself in prison, without the aid of the said fees; AND THAT HE WAS NOT MAINTAINED BY THE SAID DEFENDANT; whereupon the District Court gave judgment for the plaintiff; which, on an appeal, was affirmed by the unanimous opinion of this Court, upon the ground (so far as my opinion concurred) of the special finding of the Jury above stated. But there is no such finding, nor any thing similar, in the case before us. On the contrary, the Jury here find that *Duval* resided in a house distinct from the prison, but within the rules; for the rent of which he contracted with *John Henry*, the proprietor, *but the rent never has been paid*; which finding of the Jury was more than nine years after *Duval* was discharged out of custody: from whence a strong presumption arises, that he really was insolvent, being impliedly found so by the verdict; more especially as debts for rent are recoverable in a summary way by distress.

And in order to assimilate this case to that of *Rose* and *Shore*, the Jury ought *here* to have found that *Duval* was possessed of sufficient property, and able to maintain himself in prison, and that he was not maintained by the Sheriff or gaoler.

If *Youngeusband* discharged *Duval* as an insolvent debtor unable to pay the prison fees, when he was not so, he thereby made himself liable for the debt: and suppose this had been a suit to compel him to pay it, what would

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have been the gist of the action? the ability of the prisoner to pay the fees, or to maintain himself in prison, which the plaintiff must have *averred and proved*, (as in the case of *Shore* against *Rose*,) before he could have had a verdict in his favour.

What was the principal point in controversy between *Shore* and *Rose*? the ability of *Cluiborne* to pay the fees, or to maintain himself in prison; which being proved to the satisfaction of the Jury, they so found the fact specially, and the Court very properly gave judgment for the plaintiff. So, on the same principle, if a Sheriff brings suit against a creditor on a bond for payment of the prison fees of his insolvent debtor, he must aver and prove the *insolvency* of the prisoner before he can recover; but he is not bound to prove such insolvency before he has a right to demand the security required by law; for he has a right to make the requisition immediately on the prisoner's being confined.

The *proof* of the *solvency* or *insolvency* of an imprisoned debtor, in any apprehension, rests on circumstances as the case may be. Where the creditor brings an action against the Sheriff or gaoler, to subject him to the payment of the debt, for having discharged the prisoner, as unable to pay, or to maintain himself in prison, when he was not so; or to recover money wrongfully paid for the maintenance of such prisoner, (as in the case of *Shore* against *Rose*,) the proof of the *solvency* of the prisoner lies on the creditor: And where a Sheriff or gaoler brings suit against a creditor for the fees of his imprisoned debtor, the proof of the *insolvency* of the prisoner lies on the Sheriff or gaoler.

On these grounds I am of opinion that *Youngehusband* was justified by law in discharging *Duval* out of custody; but, lest I be mistaken on this point, I proceed to consider the other, to wit, Whether the written discharge of the prisoner, by the Sheriff, did not exonerate the securities from the penalty of the bond for his keeping within the

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I am to consider this point, then, on a presumption that the Sheriff had *not* a legal right to discharge the prisoner, but that he did so in his own wrong, and at his peril; and became immediately liable to the creditor for the amount of the debt: and *he* being so liable, why vex and distress an innocent security for the malfeasance of a public officer, of ability to answer for his own misconduct, instead of having immediate recourse against *him*? The appellee bound himself, his heirs, &c. with condition that the prisoner, *Daniel Duval*, should keep within the prison rules until thence discharged by due course of law; and being discharged *by the Sheriff*, in whose custody he was, that may well be considered as a discharge in due course of law; as the Sheriff was the only executor of the law, he was the only person who could of right discharge the prisoner in any event.

Suppose the Sheriff in the written discharge, instead of saying it was for want of security for the prison fees, had stated that the prisoner had paid him the full amount of the debt and costs, would not that be considered as a discharge by due course of law, whether the money had, or had not, been paid to the Sheriff? or would the securities have been bound to prove an actual payment of it? I confidently conceive not; nor were *they*, as the case stood, bound to prove the insolvency of the prisoner.

Mr. *Williams*, though, contended that "if the debtor had tendered the whole debt and costs to the Sheriff, he would have had no right to discharge him!" Miserable, indeed, would be the case of every prisoner confined for debt, should that be adjudged to be law!!

As to the *recital* in the discharge, that *Duval* was a prisoner within the bounds of the prison *as laid off by the General Court*, (noticed in the argument by Mr. *Williams*,) I believe it to be correct. The County gaol of *Henrico* has been used as the public gaol, ever since the removal of the seat of go-

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vernment to *Richmond*; and by several acts of assembly, passed from time to time, the Judges of the General Court were empowered to superintend and regulate the public gaol; and the bounds laid off by direction of that Court, under the authority of one of those acts, have always been considered and used as the prison bounds of *Henrico* County; unless they have since been altered by order of the District Court. But, be that as it may, the circumstance, in my apprehension, does not affect the merits of this cause.

Let us consider what was the true nature, intent, and *spirit* of the undertaking of the securities? It was that *Daniel Duval* should not *escape*, nor *voluntarily depart* out of the prison rules; but they did not mean to be responsible for the misconduct of the Sheriff (with whom they had no privity, and who was the only person, I conceive, that in any event had a right to discharge the prisoner) in case he should discharge him without legal authority. The Sheriff had the same right over the prisoner, so far as respects his *legal discharge*, as if he had been confined in the debtors' room of the gaol, and the key in the pocket of the Sheriff, who, at the time of his admission to office, had given ample security for the due and faithful performance of his duty; and against whom for misfeasance or malfeasance in office, any person aggrieved by his misconduct, had a prompt and legal remedy by action on the Sheriff's bond.

A Sheriff who discharges a prisoner contrary to law, makes himself liable for the debt, but cannot subject the innocent securities, who have no control over him, to loss or damage, by his own acts or default; for the Sheriff's and prisoner's securities cannot, or ought not, to be both answerable at the same time, to the creditor for an escape; as that would be making them securities for each other, without the consent of either; and would deter many from acts of benevolence and kindness towards unfortunate persons imprisoned for debt, in becoming their securities for the prison bounds.

From the evidence and circumstances disclosed in this

record, I have a conviction that *Daniel Duval* was truly insolvent, unable to pay the prison fees, or to maintain himself in prison; or, on a supposition that he *might* have been so, (which is the case of many unfortunate debtors,) what was he to do when the Sheriff told him "he was no longer his prisoner," and gave him a discharge in writing, in which he stated his reasons for doing so? Was he to answer the Sheriff, "that he had no right to discharge him, and that if he would not maintain him in prison, he must and would lie there and perish for want of sustenance?" Such a determination would neither have been consistent with human prudence, nor within the utmost effort of human fortitude: and, if persisted in, of what advantage would it have been to the creditor? None at all; but, on the contrary, would have been a sure and certain means of the loss of the debt, at best, very doubtful; but at that time almost desperate: but by obeying the mandate of the Sheriff, it made *him*, if he acted illegally, liable for the debt; against whom the creditor ought immediately to have proceeded for the recovery of it: but, instead of doing so, she lies by for upwards of *six* years, and then brings suit against an innocent security, who had done her no injury.

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Besides all this, the law never supposes a poor prisoner a proper judge of the official duties of an executive officer; or under what particular circumstances he may be legally discharged by the Sheriff, before the debt be paid; but those things remain altogether with the Sheriff; who, *at his peril*, is to conduct himself according to law.

On these grounds, I am of opinion that the judgment of the District Court is correct, and ought to be affirmed. And I am authorized to say that the late venerable and enlightened President of this Court, who heard the cause very fully and ably argued, was of the same opinion. But as a majority of the Court, now present, is of a different opinion, the judgment of the District Court is to be reversed, and judgment entered for the appellant.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA:

At the term commencing the 15th day of April, 1810.

IN THE THIRTY-FOURTH YEAR OF THE COMMONWEALTH.

JUDGES, WILLIAM FLEMING, Esquire, *President*.
SPENCER ROANE, Esquire.
ST. GEORGE TUCKER, Esquire.

ATTORNEY-GENERAL,
PHILIP NORBORNE NICHOLAS, Esquire.

Tuesday,
March 13.

Chichester's Executrix against Vass's Administrator.

AFTER the decision of the Court of Appeals in the case of *Chichester v. Vass*, (for which see 1 *Call*, 105.) a proper and necessary to go into equity for a *discovery*, the Court (having possession of the subject) will proceed to *decide* the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law.

2. If *A.* promise *B.* that, if he and *A.*'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters, as fast as it is in his power with convenience;" and the marriage be afterwards had with his consent; the promise is sufficiently certain and obligatory.

3. In such case, *A.* has not his *life-time* to perform it in; but, in a *reasonable* time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to *B.* and wife, equal to the largest made to his other daughters.

4. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of *lands* to the wife. The husband (to whom the promise was made) has his election to consider it a *personal* contract; and if he survive the wife, may sue in his own right to recover damages for a breach.

5. A husband surviving his wife (or in case of his death afterwards, his executor or administrator) may maintain an action on a *personal* contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate.

new suit was brought by *Vass*, in the late High Court of Chancery, against *Sarah Chichester*, widow, devisee and executrix, and others, children and grandchildren of the said *Richard Chichester*, deceased.

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The case was this. Dr. *Vass* having paid his addresses to a daughter of Col. *Chichester*, on the 10th of *April*, 1789, wrote to him to ask his consent to their marriage. In his letter he says, "Should you disapprove of the matter, we shall endeavour to bear the *disappointment* with all possible fortitude; being determined to do *nothing* that may create the least uneasiness or anxiety to you."

Col. *Chichester*, in answer to that letter, on the 12th of *April*, 1789, says, "he has no reason to doubt his daughter's understanding and prudence; that, if it be her choice in full consideration, his approbation will not be withheld; that his circumstances are such that his daughters cannot expect large fortunes, but he shall endeavour to do them *equal justice, as fast as it is in his power, with convenience;*" and concludes with repeating "that he should not object to his daughter's determination, but give his approbation."

The marriage shortly after took effect. On the 5th of *January*, 1790, in answer to a letter from Dr. *Vass*, offering some objections to settling in *Alexandria*, Col. *Chichester* writes thus: "Your observations respecting *Alexandria* carry reason with them. *Nothing in my power*, without *distressing ourselves*, shall be wanting to assist you in *settling to your satisfaction.*" He then adds, "if a *plantation* in the upper parts of the country would be more agreeable than a settlement in town, perhaps I can with propriety get off the contract made with *Stewart* for that tract of land in the county of *Shenandoah*; but, when I contracted with him," (for the sale, it would appear,) "I did not expect any of *my family* would be pleased with that part of the world for a settlement; which was my only reason for attempting to sell it. If *Colchester* or *Dumfries* would be more agreeable, I will endeavour to

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procure a lot for the purpose in *FREE-SIMPLE*, or will do any thing in my power, in any place you think most agreeable."

On the 24th of *February* following, Col. *Chichester* wrote a letter to Col. *James Gordon*, in *Lancaster*, which begins thus: "Our friend and connection Dr. *Vass* and myself concur in opinion that in the neighbourhood of your Court-house is a good and proper stand for a physician;" and then proceeds to inquire whether a small tract of land with a house on it can be bought in that neighbourhood on reasonable terms; speaks of several which he is informed are for sale; says that two or three hundred acres of tolerable land, with a sufficiency of wood, and a small comfortable house, will be quite enough; mentions a particular plantation on which there is no house "*and how it would suit the Doctor to BUILD*, he cannot determine." He then adds, "that his late advancement for his daughter *Lee* put it out of his power to make immediate payment for the lands before mentioned to be bought, but that he expected about 50*l.* could be paid in *May* following, and the balance at two annual payments after. If it could be of any material advantage in the purchase, perhaps the whole balance may be advanced in *May* or *June*, 1791;" which was the succeeding year. In a postscript he says, "I do not wish any contract *confirmed* until I receive your answer, but conditionally *secure* for my approbation."

The bill stated, that Mrs. *Vass* dying in child-bed before any advancement was actually made, her father shewed no farther inclination to give any thing to the complainant, and actually refused to do so, although he had before made some very considerable advances to the husbands of his other daughters; that the complainant thereafter brought an action at law against *Chichester*. and obtained a verdict for 500*l.* damages; but the judgment thereupon was reversed in the Court of Appeals; that, pending the appeal, *Chichester* died, leaving the defendant, his widow, his executrix; as also a very large estate devised and bequeathed to her and the other defend-

ants; and called for a *discovery* of what advances their father in his life-time had made to his daughters severally, and of *what value* they were, and *when made* to them respectively; and that they should state the value of the several devises and bequests to their children respectively; and that, such discovery being made, as well as a discovery of the other estate of the said *Chichester*, there might be decreed to the complainant as much as came to the share of any of the said daughters, or the children of any of them, &c.; concluding with a prayer for general relief.

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The executrix demurred to so much of the bill as seeks for *redress*, by decree of the Court of Chancery, on the promise charged in the bill to have been made by her testator to the complainant, and shewed for cause of demurrer, that it appeared, by his own shewing in his bill, that he had not any equity or title whereon such a decree can be grounded; and that the validity of such promise is a matter properly triable at *law*, and the remedy thereon is at *law*, and not in *equity*.

She then proceeds to answer the allegations of the bill *generally*; and, from her answer and those of several of the other defendants, (the daughters and their husbands,) it appeared, that Col. *Chichester* had made some considerable advances to the husbands of two of them; from one of whom he took a bond in the penalty of 3,000*l.* with condition that the husband should leave the wife lands of the value of 500*l.* for *her life*, in case she should survive him; that, on the marriage of a third with Mr. *Hancock Lee*, he laid out 500*l.* in land, and settled the same on Mrs. *Lee* and the children of the marriage; and that, some time after the marriage of his daughter *Sarah McCarty Chichester* with *Thomson Mason*, he gave to the said *Thomson Mason*, as her portion, 500*l.* a negro girl, and a horse and saddle.

The will of *Chichester*, (which was among the exhibits,) dated the 10th day of *October*, 1793, (while the suit at common law brought by *Vass* against him was pending,) contains a variety of devises and bequests to his sons and

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daughters and his grandchildren, with as great a variety of limitations and contingencies; the property given to his daughters being *in general* expressly limited to them for *life* only, with remainders over. But, in one part of the will, this caution seems to have forsaken the testator: for after devising and bequeathing a very considerable portion of property, in lands, slaves and personals, to his wife *Sarah*, the executrix, "for and during the term of her natural life, with a power, either by deed or deeds in her life-time, or by a last will and testament, to give, devise and bequeath the said lands and slaves, and all other mentioned property, or any part thereof, to *any one child or children*, or any one grandchild or grandchildren, of her's and *his* in fee-simple and absolute property, or for any lesser estate," &c.; he gives and bequeaths ("for want of such disposition of any part of the said *land* and slaves and other property mentioned) the said *personal* estate to be divided among his three daughters," (naming them particularly,) "to them and their heirs and assigns respectively for ever." In another part of the will (having bequeathed to his wife a considerable number of slaves so long as she should remain a widow) he directs that, in case of her marriage, those slaves, with their increase, are to be equally divided into six parts; one equal sixth part whereof he gives to his daughter *Sarah McCarty*, with *all their increase*, to her and her heirs for ever. There are some other limitations, in fee-simple, of slaves to his daughters, upon certain contingencies; and, finally, by a residuary clause, he gives all his estate, real and personal, not before disposed of, to all his children, by name, to them, their heirs and assigns for ever.

The Chancellor (overruling the demurrer) decreed that the executrix, out of the estate of her testator, should pay to the complainant 565*l*. "being the *supposed* value of the marriage portion of *Sarah McCarty*, the wife of *Thomson Mason*, and the advancements to her, (and which value should have been ascertained by a Jury, if the parties would have con-

sented to it,) with interest thereon at the rate of *six per centum per annum* from the last day of *October*, in the year 1791:” from which decree an appeal was taken by the defendant *Sarah Chichester*, and, having abated by the death of *Vass*, was revived against *Robert Dunbar*, his administrator.

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Wickham and *Randolph*, for the appellant.

Williams, *Warden* and *Botts*, for the appellee.

The cause was argued at great length on the merits; and especially on the question whether a Court of Equity had jurisdiction to give the *relief* sought by the bill.

1. On the question of *jurisdiction*; the counsel for the appellant contended that the face of the bill presented a mere legal case. (a) If the agreement was to convey personal estate, a bill for *specific performance* would not lie, in general, (b) though, perhaps, in this country, it might lie for slaves. Neither could the jurisdiction be sustained on the ground of *discovery*. It is not enough for a party to allege that he wants a discovery: it must be proved to be wanting. And here, in fact, it appears unnecessary; for all the evidence to shew what *Chichester* had done for his other children was to be found in his last will and testament and deeds; copies of which could be procured from the several Clerks' offices.

But, even if a discovery had been requisite, the case, after such *discovery* had, was clearly proper for a Court of law. The bill, therefore, should have prayed for the discovery only, and not for *relief* thereupon; a bill for discovery being always at the costs of the plaintiff, 1 *Harr.* 145. The general rule in such cases is, that the plaintiff, having obtained the discovery sought for, must bring his suit at law: (c) and it is now settled that if the bill seek *relief*, where the plaintiff is only entitled to *discovery*, a general demurrer

(a) *Banister's Executors v. Shore*, 1 *Wash.* 173. *Long v. Colston*, 1 *Hen. & Munf.* 111. *Pollard v. Patterson*, 3 *Hen. & Munf.* 67.
(b) *Cud v. Rutter*, 1 *P. Wms.* 570.

(c) *Mitf.* 52. *Hinde's Pr.* Ch. 36. *Harr.* Ch. Pr. 139. 141. 2 *Bro. Ch. Cases*, 61. *Geach v. Barber*, 1 *Fesey*, 345. *Walmesley v. Child*. *Ibid.* 521. *Piers v. Piers*.

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(a) 4 Bro.
Ch. Cases,
480. *Collis v.*
Swaine. Coop.
Eq. Pl. 188,
189. *Ibid.* 58.
3 *Vesey*, jun.
4. *Loker v.*
Rolle. 2 Bro.
Ch. Cases, 280.
Fry v. Penn.
Ibid. 319.
Price v.
James.
(b) *Coop. Eq.*
Pleadings,
129, 130.
(c) *Ibid.* 130.
(d) *Book* 6.
o. 3. s. 6. note
(p).

will be sustained. (a) Indeed, the case of a *lost bond* seems an exception to this rule; because, *originally*, in that case, there was no relief at law; a *profert* according to the old decisions being necessary; (b) and, therefore, the Court of Equity having obtained jurisdiction, still gives relief, though the reason for doing so has ceased, since, according to the modern authorities, a *profert* is not necessary, at law, where the bond is averred to be lost. (c) But this concurrent jurisdiction as to *relief* does not extend to the case of a lost promissory note.

It may be said that 2 *Fonb.* 494. (d) observes, that "there are some cases in which, *though the plaintiff might be relieved at law*, a Court of Equity having obtained jurisdiction for the purpose of *discovery*, will entertain the suit for the purpose of *relief*." But the cases he cites do not support his position; for in 1 *P. Wms.* 496. *Bishop of Winchester v. Knight*, there was certainly no remedy at law; and the same observation applies to 2 *Atk.* 630. *Story v. Lord Windsor*. The case of *Lee v. Alston*, 1 Bro. Ch. Cases, 194. was also a proper case for a Court of Equity; because, in *England*, the tenant for life is considered as bailiff for the reversioner, and may be compelled to *account*. *Fonblanque*, indeed, seems to have been at a loss to strike out the distinguishing principle upon which Courts of Equity in such cases have proceeded: but it is evidently this, that, wherever the case, independently of the discovery, is proper for a Court of *Equity*, there the *discovery* and *relief* will both be granted; but where, in itself, it is proper for a Court of *Law*, equity will grant the *discovery only*. If the doctrine were otherwise, even actions of assault and battery and slander might be brought in Chancery.

In answer to this, it was said, that the uniform decisions in this country were otherwise. The oldest practitioner of law cannot point out an instance where a discovery has been had in equity, and the party then sent to law for relief.

The cases of *Carter v. Carter*, (a) *Foster v. Foster*, (b) *Pryor v. Adams*, (c) *Barrett v. Floyd*, (d) and *Chinn v. Heale*, (e) decided in this Court, and *Taylor v. Ewell*, decided by Chancellor *Taylor*, in *February*, 1810, together with *Burnley's* case, shortly after the revolution, (f) were relied upon as in point.

On no principle ought a party to be sent to law for *relief*, after obtaining a discovery in equity. The maxim of equity is to prevent circuitry of action; and, therefore, when the Court can determine the matter, it should not be a handmaid to the other Courts, nor beget a suit to be ended elsewhere. (g) The modern practice in *England*, in violation of this principle, is founded on an arbitrary dictum of Lord *Thurlow's*, (h) and ought not to overrule the more equitable decisions of our own Courts. (i) In many instances the practice of this country differs from that of *England*; as in the case of a bill to foreclose a mortgage, the decree *there* is simply that the mortgagor be foreclosed of his equity of redemption, and that the mortgagee have the absolute right of property: but *here* the practice is to decree a *sale*.

The objection that, if *relief* attached on discovery, actions of assault and battery and slander might be brought in Chancery, is altogether groundless; for Courts of Equity never assist in cases of torts, even to compel a discovery. As to other cases of a merely legal nature, there is no hardship in giving relief upon the discovery; for the plaintiff lays himself at the mercy of the defendant, relying on his conscience; and the decree is founded on his own admission.

But, in this case, the bill on its face presented a proper case for a Court of Equity, for it prayed an *account*, and the matter in controversy was a proper subject for an account. It was also a proper case for abatement and contribution by the legatees.

There was certainly a necessity for going into equity to obtain the discovery; for at law the distributees might, on the ground of interest, have objected to giving evidence. The plaintiff could not prove a negative; that he *did not*

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(a) In 1784,
(according to
a MS. of the
late Judge
Pendleton.
(b) MS.
(c) 1 *Call*, 392.
(d) 3 *Call*, 531.
(e) *Ante*, p. 63.
(f) Judge
Pendleton's
MS.
(g) 2 *Fonbl.*
494.
(h) 2 *Bro Ch.*
319.
(i) See also,
contra, *Branden v. Sands*,
3 *Ves. jun.* 514.

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know what *Chichester* had advanced to the other children : but, from the nature of such transactions, it was sufficiently evident that he had not the knowledge requisite to enable him to proceed at law. Had *land only* been given, information might have been obtained, but as to *money* it was impossible, it never being the usage in transactions of this kind to call on witnesses to take notice what a father gives his son-in-law.

But the question, whether a discovery was necessary or not, was closed by the defendant's *demurring*, instead of *pleading* to the jurisdiction. On a *demurrer*, the allegations in the bill are considered as true. (a) The defendant, therefore, cannot now deny that the necessity actually existed as alleged in the bill. If she meant to say that the plaintiff had no need of such discovery, but that the statements in the bill were only colourable to give jurisdiction, she should have put in a *plea* to that effect; (b) for the ground of a *demurrer* must always appear on the face of the bill; and if you intend to take advantage of any thing not on the face of the bill, it must be by *plea*. (c)

(a) *Cowp.* 111.
Misf. 179.
(b) *Misf.* 175.
2 *Ves.* jun.
199. *Mundy*
v. Mundy. 4
Bro. Ch. Cas.
254. S. C.
Coop. Eq. pt.
292. *Misf.* 252.
(c) *Misf.* 14.
1 *Ves.* 245.

In reply it was observed, that Mr. *Pendleton's MS.* opinion in *Carter v. Carter* proves nothing. The appeal was dismissed, because, perhaps, the appellant's counsel, or the rest of the Court, were of a different opinion. *Foster v. Foster* was a case where negroes were claimed, of which the plaintiff had never been in possession, but to which he was entitled by executory contract. Neither *detinue* nor *trover* would lie: but a bill in equity lay for specific performance.

In *Pryor v. Adams* (it was contended) the Court evidently mistook the law. It is not true that this case depends upon the more *modern* authorities in *England*: all the *old* books of practice lay down the doctrine that where relief was prayed in a bill for *discovery*, the *part praying relief* might be demurred to, though the defendant was still compelled to answer as to the *discovery*. The only difference between the old and modern authorities is, that latterly the doctrine

has been established that, in such case, the *whole* bill may be demurred to, and *no* answer is necessary. Here the *answer* was to the *discovery*; the *demurrer* to the *relief*; exactly according to the old rules of practice. In the case of *Pryor v. Adams*, there was no argument on this point; and, that decision being against the authorities, had this Court a right to change a law? Other instances were mentioned in which this Court had been mistaken, and had had the magnanimity to acknowledge its errors; for example, as to its jurisdiction relative to appeals from interlocutory decrees,^(a) and to criminal cases.^(b)

In *Chinn v. Heale*, the bill was for specific performance, and the ground for relief in equity clear. Authorities in this country, therefore, do not appear to differ with those in *England* on the point in question.

The ground taken, that the matter in this bill is of *equitable* cognisance, is entirely untenable. The plaintiff could not call for *specific performance*; for he could not point out any particular land, or slaves, and demand a conveyance. His only remedy was for *damages* for breach of contract; and he ranked only as a simple contract creditor. There was no ground for contribution against the legatees; for all the advancements were made in *Chichester's* life-time, and there was no pretence of a deficiency of assets in the hands of the executrix; without which the legatees could not be sued. And, as to the ground of relief for the sake of an *account*; a bill in equity for an account lies only where the old action of account lay; in cases of mutual trust and confidence, as between guardian and ward, principal and factor, &c.; not in common cases, where there is no such trust and confidence; for, if it could, a merchant would have nothing to do but to bring suits in Chancery on all his store accounts.

Upon the *MERITS*, it was contended by the counsel for the appellant, 1. That the promise made by *Chichester* was too indefinite and uncertain to be obligatory in law or equity. It was a mere declaration of an intention to do

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(a) *M^r Call*
v. Peachy, 1
Cult, 55

(b) *Bedinger*
v. The Com-
monwealth, 8
Call, 461.

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istrator.

(a) 1 Vin. 292
citing *Poph.*
148. *Sylves-*
ter's case. 1
Bac. Abr. 264.
(*Gwill.* edit.)
same case cit-
ed more cor-
rectly. *Banis-*
ter v. Shore, 1
Wash. 173.
(b) 1 Call, 83.
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equal justice to all his daughters, according to his own convenience; of both which he was himself the best judge.

The letter of *Vass* merely asked his consent to the marriage, without any proposition for a portion, and therefore takes the case out of the class of marriage agreements.(a)

2. If the promise was binding at all, *Chichester* had his whole life to perform it in.(b)

3. It might have been satisfied by a conveyance of lands to Mrs. *Vass*, the contract having been for her benefit only; in which case, upon her death, the lands would have reverted to her father, as heir at law; and her husband would not have been entitled, even as tenant by the curtesy; since there was no issue born alive. Of course, Mrs. *Vass* being now dead without issue, her father ought not to be compelled to make a conveyance to her husband, for whose benefit the contract never was intended.

4. *Vass* had no right to bring the suit as representative of his wife; having never administered on her estate.

In answer to the first and second points, the opinion of three Judges of this Court, in the case of *Chichester v. Vass*,(c) were relied upon as in favour of the validity of the promise; Judge LYONS alone seeming to incline against it, but expressly reserving the point, for future argument, if the case should ever occur again.(d) The other Judges acted on a review of all the *British* cases, among which (e) 2 Vern. *Wankford v. Fottherly*(e) is nearly in point; to which may be added *Allen*, 36. *Roll. Abr.* 347. and *Sid.* 25.

The suit at common law went off altogether upon the defect in the declaration; and no such point was decided by the Court, as that *Chichester* had his whole life to perform his promise. If the Court had seen there was no promise at all, or that no action could have been brought against *Chichester*, in his life-time, they would not have sent *Vass* back with encouragement to bring a new action.

The case in 1 *Viner*, 292. is in favour of the appellee. The promise ought to be understood as to be performed

in a *reasonable time* after the marriage; for the purpose of maintaining *Vass*, and his wife and children, if he should have any. This could not be satisfied by postponing performance until after *Chichester's* death. So, with respect to a promise to pay money when *convenient*, it is settled that it must be in *reasonable time*.(a) But, in fact, this point is of no great importance; for *this* suit was not brought until after *Chichester's* death.

3. The contract could not have been satisfied by a settlement of *land* on Mrs. *Vass*. The case in *Viner*, and that of *Chichester v. Vass*, before cited, prove this.(b) Contracts are to be understood according to their intent and subject matter. A promise of this kind (in case of ambiguity) is to be taken most strongly against the party promising, and most beneficially for the person to whom the promise was made. Here *that person* was *Vass*; and it must be understood as intended to enure to *his* benefit, as well as that of his wife. If *Chichester* had his election to convey *lands*, he has not done it; and he lost that election when the convenient time (to be judged of by the Court) expired.

4. The compensation for breach of a contract is a *personal*, not a *real* property, and belonged to the husband; either as administrator of the wife, if he had administered, or as sole contracting party. In equity he had a right compounded of these two; and might bring his suit as sole distributee of his wife.(c) If any other person had been the administrator, such administrator could only have sued upon contracts made with the wife: but here the contract was with the *husband*.

If the husband does not administer, he still has the right of representation in equity.(d) The cases of *Robinson v. Brock*,(e) *Dade v. Alexander*,(f) *Drummond v. Sneed*,(g) and *Hord v. Upshaw*,(h) were all instances in which the husband sued without administering; and those above cited affirm the proposition that, if administration were sought on Mrs. *Vass's* estate, Dr. *Vass's* representa-

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(a) 6 Co. Rep.
31. 1 Co. Rep.
25. Porter's
case. Co. Litt.
208. Roll.
Abr. 436, 437.
Cro. Eliz. 798.
Moor, 472.

Hardr. 10.
(b) See also 3
Bac. Abr.
(Gwill. edit.)
709. tit. Obliga-
tion, letter
F.

(c) 1 Wils.
166.

(d) 1 P. Wms.
378. Squibb v.
Wyer. Ib. 381.
citing the case
of Cart and
Rees in 1718.
3 Atk. 527.
Harg. Co. Litt.
351. note (1).
(e) 1 H. & M.
213.

(f) 1 Wash. 30.
(g) 2 Call,
491.

(h) Cited in 1
Wash. 30.

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tives would be entitled, and, if any other person should get administration, such person would be merely a trustee for his representatives.

Friday, April 20th. The Judges pronounced their opinions.

Judge TUCKER stated the case; in the course of which he observed that the defendant, *Sarah Chichester*, by answering the allegations of the bill *generally*, without confining herself to the matters a discovery of which was sought, might, perhaps, according to some authorities, (a) be considered as waiving the benefit of her demurrer. He was inclined, however, when sitting as a Judge of a Court which professes to soften the rigours of the law, not to refuse to a party the same latitude of defence which our statutory law now indulges in Courts of Law.

(a) *Mif.* 171.
3 *P. Wms.* 80.
2 *Atk.* 157.

He then proceeded as follows:

The principal point relied on by the counsel for the appellant is, that a Court of Chancery has no jurisdiction over this case, and, therefore, that the decree is erroneous in overruling the demurrer and granting relief: for although the complainant might have been entitled to the *discovery* sought, he was not entitled to any *relief*. And, among the arguments urged on this point, it was more than once insisted on that Mrs. *Vass* being dead, and the promise being *literally* to do equal justice to all his daughters, as fast as it should be in his power with *convenience*, no suit or action either at *law* or in equity will lie upon this promise. And a further reason for this objection was, that Mr. *Chichester* might have given his daughter land, if he had chosen so to do; in which case, as she died without ever having a child, Doctor *Vass* could not even have a life estate therein; and moreover, that *Chichester* had his whole life to perform his promise in; and having survived his daughter, and being moreover her next heir, it would be doing a vain thing to compel him to make a conveyance which would be of no benefit to the complainant under these circumstances.

It will not, I presume, be denied, that a promise to do a moral action founded upon a good and sufficient, or valuable consideration, actually given or performed in pursuance of such promise, is binding upon the party making the same, and may be enforced, according to the nature of it, either in a Court of Law or Equity. Of course, if the law *cannot* equity *ought* to enforce it. Taking then the position, that an action *at law* cannot, under the circumstances of the present case, be maintained upon this promise, as contended for, I will consider whether this promise contains such ingredients as that a Court of *Equity* ought to grant the relief sought.

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The following principles appear to me to require no comment or illustration.

1st. That a promise made by a father to a person who seeks an alliance with his daughter is a promise made in *consideration* of marriage, if the marriage be afterwards had with his consent.

2d. That although such promise may *literally* import a provision to be made for the daughter; yet, being made *to the intended husband*, it must be construed to be one which shall enure to the benefit of *both*, unless there be some *special* reservation to the *contrary*; manifesting a clear intention to preclude him from participating in the benefit thereof.

If these principles be correct, the letter of the 12th of *April*, 1789, must be considered as a promise made by Mr. *Chichester* to Doctor *Vass* in *consideration* of his intended alliance with his daughter, which, according to the expressions contained in the Doctor's letter to him of the 10th of *April*, depended upon *Chichester's consent*, the young couple being determined to do nothing that might create the *least* uneasiness or anxiety to him; but to *bear their disappointment* with all possible fortitude. No repugnance to this consent is expressed by Mr. *Chichester*, nor any terms or *settlement* at any time hinted at, in any of his letters to the Doctor,

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or others on the subject. It must therefore be taken as a promise to enure to the benefit *both* of the *future* husband and wife. Even when Mr. *Chichester* had it in contemplation to purchase a plantation, or a lot and house in *Colchester* or *Dumfries*, or to give a plantation which he had in *Shenandoah* County, not a word is said which conveys the most distant hint that he meant to make the conveyance to his daughter, *separately*, or to require a settlement from Doctor *Vass*, before he should give his daughter any thing. In his letter of *January* 5th, 1790, he tells him nothing in his power, without distressing himself, shall be wanting to assist the Doctor in settling to *his satisfaction*. In the same letter he offers to purchase a lot in *Colchester* or *Dumfries* in *fee-simple*, or do any thing in his power in any place the Doctor should think most agreeable. Surely these expressions manifest an intention to do something that should enure to the Doctor's benefit, and must be referred to the *original promise*, and as manifesting the intention of it. And, though it should be true (which it is unnecessary to decide) that Mr. *Chichester* had his whole life to perform any part of that promise, since it was made to depend upon his convenience; and that he *might* have given his daughter land, only, and not money, or other personal property, yet if he had such an election, he made no use of it, and the promise ought to be enforced in such a manner as may be most beneficial to the person to whom it was made, having regard to the measure of his bounty to his other daughters, to determine that which was due to the others. As this was a matter not within the privity of Doctor *Vass*, if the performance were refused upon the ground that the contract was not obligatory, (as seems to have been the case according to the testimony of one witness,) or remained unperformed at the time of Mr. *Chichester's* death, a Court of Equity was certainly the proper tribunal to resort to for a *discovery* of the advances made by Mr. *Chichester* to his *other* daughters, as the standard by which to ascertain the measure of the benefit claimed by

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his son-in-law; as also for a discovery of the funds out of which the relief sought was to be given; for, if Mr. *Chichester* had died leaving no estate whatsoever undisposed of, but it should appear that, after the promise made to Doctor *Vass*, he had given property to his other daughters, would not that property be liable to contribution, as far as it would go, to make the portion of Mrs. *Vass* equal to that of her sisters? Or, if he had died intestate, leaving only lands into which the daughters or their husbands had entered as his heirs, would not those lands be liable to such a contribution for the portion promised the remaining daughter? Again, the nature and quality of the property or estate given to the other daughters, with the conditions (if any) under which it was given to the other daughters, might form a proper subject of inquiry in a Court of Equity, in order to enable that Court to do, what *Chichester* promised to do, "*equal justice*" among all the daughters. A *discovery* of all these things was therefore very properly required; and until that discovery were made, the Court could not possibly judge whether the complainant was *entitled to relief, or not*. The case exhibited by the bill does not therefore furnish, in my opinion, any proper or reasonable ground for the demurrer, which is confined to the *relief* sought; of the propriety of granting or refusing which the Court could not possibly judge until the merits were brought before it by the answer and other evidence in the cause. I therefore think the Court decided properly in overruling the demurrer. That obstacle once removed, the complainant's right to *relief*, either as an original party to the contract, or as the administrator of his wife, was unquestionable.

I have before said that if a promise be made to two persons of different sexes, in consideration of a marriage to be had between them, if they marry, the promise shall enure to the benefit of *both*. And this upon the principle of that *unity of person* which the law establishes between them upon their marriage, and that upon the principles of the common

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law; for, by that, if a reversion be granted to a man and a woman, and their heirs, and before *attornment* they intermarry, and then *attornment* is made, the husband and wife shall have no moieties: so, if a feoffment be made to a man and a woman, with a letter of attorney to make livery, and then they intermarry, and livery is made *secundum formam chartæ*, in that case also it is said they have no moieties. So, if an estate were made to a *villein*, and his wife being free, and to their heirs, although they have several capacities, viz. the *villein* to purchase for the benefit of the lord, and the wife for her own, yet, if the lord of the *villein* enter, and the wife survive her husband, she shall enjoy the *whole*

(a) *Co. Litt.* land; because there are *no moieties* between them: (a) and 187. b. that this is the true reason of the law, appears from this; that if a joint estate be made to a husband and wife and to a *third person*, in that case the husband and wife have in law but one moiety, and the *third person* shall have the *other*

(b) *Litt. sect.* moiety. (b) And Judge *Blackstone*, speaking upon the same 291. subject, says, that if an estate in fee be given to a man and his wife, they are neither properly joint-tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties; but *both* are seised of the *entirety, per tout* and *non per my*; the consequence of which is, that neither the husband nor wife can dispose of any part without the assent of the other, but the *whole must remain to the survivor*. (c) The case of

(c) 2 *Bl.*
Com. 182.

(d) *Prec. in* *Back v. Andrews*, 2 *Vern.* 120. is to the same effect. (d)
Ch. 1. S. C. 2
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230. S. C.

According to these authorities, and particularly the latter, it would appear that if there be a specific promise of lands to a man and a woman, in consideration of their intended marriage, and they afterwards marry, and the conveyance be not made according to the promise; the survivor, in whom the whole interest and estate would have vested if there had been a conveyance made during the life of both, would be well entitled to come into a Court of Equity for a conveyance of the *whole* estate to *himself* or *herself*. How far the second section of the act concerning joint rights

and obligations, (a) may be considered as operating on this case, so as to destroy the principle of *entirety*, is a matter which may hereafter deserve great consideration. But, should it be determined in the affirmative, still it would seem that the survivor might well come into a Court of Equity for a conveyance, if not of the *whole*, at least of a *moiety*. Judge *Pendleton*, in delivering his opinion on this very case, when before this Court on a former occasion, speaking of the promise contained in Col. *Chichester's* letter, says, "If it were considered merely as a promise of a personalty, that right would vest, as a *joint interest*, in the husband and wife, until reduced into possession, and go to the *survivor*, if either died before that happened." This perfectly accords with what I meant to advance upon this subject. In the case of *Elliott v. Collier*, (b) where a bill was brought by the representative of a husband, who died without administering to the personal estate which the wife had in her own right, for the wife's share of her father's customary estate, as a citizen of *London*, Lord *Hardwicke* declared that the plaintiff was entitled to a decree for the same, notwithstanding the husband had not taken out letters of administration. (c) From these authorities, strengthened by our own act concerning wills, &c. which expressly establishes the priority of the husband's right to administer on the estate of his wife, and exempts him from making distribution of it, (d) I conceive it was not necessary for Doctor *Vass* to administer upon his wife's estate, in order to entitle him to bring this bill; and that, upon the whole, the decree overruling the demurrer, and giving relief, as prayed for, ought to be affirmed, after correcting the error in the rate of interest, which, perhaps, was the effect of inattention.

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(a) 1 Rev.
Code, c. 24.

(b) 3 Atk. 526.

(c) 1 Wils. 168.
1 Vern. 15. S.
C. 1 P. Wms.
380, 381. S. P.
Harg. Notes on
Co. Litt. 351.
S. P.

(d) Lawe Virg.
1794, c. 92. s.
27, 28. 1 Call,
1. Cutchin v.
Wilkinson.

Judge ROANE. Having heretofore given my opinion upon the merits of this case, I shall not enter into them at present. On those merits I am content to affirm the decree; merely making the change which has been suggested in relation to the interest. With respect to the jurisdiction

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of the Court, under the actual circumstances of the case, and the allegations of the bill before us, we are undoubtedly justified in sustaining it, by the decisions in this Court, if not by those of *England*. The case of *Pryor v. Adams* is a stronger case than the present on the point of jurisdiction, and is perhaps fully justified, among others, by the case of *Atkins v. Farr*, 1 *Atk.* 287.

Judge FLEMING. On the decision of the action at law, between the same parties, and on the same subject, by this Court, all the Judges seemed of opinion that there was sufficient evidence of a marriage promise, on the part of the appellant, to bind him to fulfil it; but, that the appellee failed in his suit, from an incurable defect in the declaration; in omitting to aver that the appellant had made advances to some one, or more, of his daughters, to a certain amount; and that it was convenient for *him* to make the like advancements to the wife of the plaintiff.

The counsel for the appellant in the present case, stated several points for the consideration of the Court. First, that a Court of Equity had no jurisdiction, it being a proper subject for a Court of Law; but if the suit be sustainable, as a bill of *discovery*, the plaintiff, having obtained the discovery sought for, ought to have gone into a Court of *Law* for *relief*. And with respect to the merits, it was contended, 1st. That there was no proof of a promise, binding either in law or equity; 2. That if the letter of the 12th *April*, 1789, should be construed to amount to a promise, the appellant had his whole life to perform it in; as the letter is qualified with the expression that he would endeavour to do his daughters equal justice as fast as it should be in his power, *with convenience*; 3. That an advancement to the daughter in *land*, would have been a complete fulfilment of the promise, and that, had such an advancement been made, the *land* would have immediately descended to the appellant, on the death of the daughter,

without having issue, born alive, to entitle the husband to hold the land, as tenant by the curtesy.


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The case has been so fully and ably discussed by the Judges who have preceded me, particularly by Judge TUCKER, that I shall add but little to what has been already said on the subject.

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With respect to the jurisdiction of the Court, this is clearly a bill of discovery, to ascertain what advances had been made to the other daughters by the father, either in his life-time, or by his last will and testament: and, that discovery being made, the only remaining question is whether the complainant was bound to dismiss his bill, and seek redress by a new suit, in a Court of Law? Mr. Wickham cited some *English* authorities that seem to favour the doctrine; but I believe the uniform practice in this country has been otherwise; especially where the subject matter is within the cognisance of a Court of Equity, and there be no latent facts, to be inquired of by a Jury, necessary to be found, in order to enable the Court to give a correct decision. And, even in such a case, the general practice is, for the Court of Chancery to direct an issue to try any particular uncertain fact that may be thought material in the cause. In the present case there was sufficient disclosed in the answer of the defendant to enable the Court to determine what sum would place the deceased wife of the complainant, or her representative, who was her surviving husband, on an equality with the other daughters of *Richard Chichester*.

As to the *first point*, on the merits, I have no doubt but that the letter of the 12th of *April*, 1789, amounted to a marriage promise; but, say the counsel, *Richard Chichester* had his whole life to perform his promise in: but that position is not admitted. His promise was, that he would do equal justice to all his daughters, as fast as it was in his power with *convenience*; the true meaning of which was, that he would do it in a reasonable time, taking into consideration the circumstances of his estate, and the length of

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time that elapsed between the marriages of his other daughters, and his advances to them respectively. But we find that he never performed it at all, not even by his last will. And, as to his having the right to make the advancement in *land*, that is not denied, provided it had been in value equivalent to the advancements to his other daughters. But, not having made such, nor any other advancement to Mrs. *Vass*, except a negro girl, and some other trifles, I concur in the opinion that *Vass* was entitled to recover a sum of money equal in value to the advances made to the other daughters.

But there seems to be an error in the decree, in giving *six* instead of *five per cent.* interest on the sum decreed; the decree must be reversed, and corrected so far as respects the interest, and affirmed as to the residue.

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Hooper and Wife and William Savage against
Royster and Wife.

UPON an appeal from an interlocutory decree of the Superior Court of Chancery for the *Richmond* District, in a suit brought by *Littleberry Royster* and *Nancy* his wife, late *Nancy Farris*, orphan of *Sherwood Farris*, deceased, against *William Savage* and *Elizabeth Gathright*, administrators of *Joseph Gathright*, *Jane Gathright*, administratrix of *Miles Gathright*, and *Anne Whitlock*, administratrix of *Benjamin Gathright*, deceased.

The bill stated that the complainants, together with *Mitchell Farris*, being the distributees of *Sherwood Farris*, deceased, had instituted a suit in the same Court against *William Farris*, administrator of the said *Sherwood Farris*, transcript of the record referred to, and receive it as evidence, so far as admitted by the answer.

2. An administrator, to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree.

3. Proof of the parol declarations of a guardian that she did not intend to charge her ward for board is admissible to repel a charge for board in her life-time, exhibited by her representatives after her death. But, in such case, she ought not to be charged with interest on a sum of money received for the ward, unless such interest would exceed the amount of a reasonable compensation for board.

4. A guardian may be allowed for moneys paid and advanced for the clothes, schooling and other necessary expenses of the ward, out of the principal of such ward's estate; if it appear that, from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of such guardian; otherwise such allowance ought to be made out of the profits only.

5. Money received by a guardian for a ward, during the paper money times, ought to be reduced by the scale of depreciation; to be applied as on the last day of the year in which it was received.

6. A reasonable time ought to be allowed a guardian to put the money of a ward out at interest; and, in this case, six months were considered as such reasonable time.

7. If money was received, by a guardian for a ward, within six months previous to the 1st of January, 1777, (when the scale of depreciation commenced,) it should be reduced according to the scale, as at the end of six months from the time when received.

8. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made.

9. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees.

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to compel a settlement of his administration account; that, in the progress of that suit, *William Farris* claimed a credit for the sum of 158*l.* 15*s.* 10 3-4*d.* paid *Anne Gathright* as guardian for the complainant *Nancy*, and, to support the claim, produced a receipt for that sum, dated *August 2d*, 177—, signed “*William Gathright, jun. for Anne Gathright;*” that the Court directed an issue to try whether the payment was made to *William Gathright* as stated, and whether he was empowered by *Anne Gathright* to receive such payment; the Jury found that the money was paid, and that *William Gathright, jun.* had authority to receive it; in consequence of which a decree was rendered establishing the credit; “*all which would more fully appear, reference being had to the record of the said suit now remaining in the said Court;*” that *Anne Gathright* had never accounted for this sum; that she died about the year —, leaving property of considerable value; but whether she left a will or not the complainants could not certainly say; that her property was divided on her death among her three sons *Joseph, Benjamin* and *Miles*, of whom the defendants were the legal representatives; and concluded with praying a decree against them for the said sum of money with interest, and for such other relief as might be consistent with equity.

The joint and several answer of the defendants admitted the intestacy of *Sherwood Farris*, the administration of *William Farris*, the guardianship of *Anne Gathright*, and the suit instituted against *William Farris*, as stated in the bill: but neither admitted or denied the validity of the receipt for 158*l.* 15*s.* 10 3-4*d.*, but called upon the plaintiffs for proof according to law; alleging, however, that “if the said receipt were genuine and authorized by the said *Anne Gathright*, still her representatives had a claim against the complainant *Nancy* for a much larger sum, namely, for ten years’ board, schooling and clothing, furnished by *Anne Gathright* to the said *Nancy*; that the said *Anne Gathright* made a will; (of which a copy was exhibited;) that the

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said will disposed of several negroes (particularly two named *Major* and *Frank*) which belonged to her deceased husband *William Gathright*, sen. and were not at her disposal, except under *his* will; that, therefore, the defendants required the plaintiffs to show her title to the said property; that, supposing, however, that all the slaves and other property mentioned in her will belonged to her, (which the defendants did not admit,) her distributing the same on a belief that it would go according to her will was an evidence of her opinion that she was exempt from any liability for the said receipt; the said *Anne Gathright* having been a woman of great economy and justice in her dealings; and that if, contrary to the expectation of the defendants, they should be decreed to account for such portions of her estate as had come to the hands of those whom they represent, they prayed that it might be in proportion to what each had received. The will of *Anne Gathright* dated *November 28, 1780*, (referred to in this answer,) appears to have devised her landed property to her sons *William* and *Benjamin*, and her slaves and personal property in various proportions to *Benjamin*, *Miles* and *Joseph*, her daughters *Fane Anne Gathright*, and *Anne Whitlock*, her grandson *Mitchell Farris*, and her granddaughters *Anne Gathright* and *Anne Farris*; appointing her two sons *Miles* and *Joseph* executors: but whether they qualified as such, or the will was ever admitted to record, does not appear. Sundry depositions were taken to support and repel the credit claimed by the defendants for the *board, schooling, and clothing* of the complainant *Nancy*, during the time of her residence in the family of *Anne Gathright*; from which it appeared that the said *Nancy* had lived, and been genteelly entertained there, 8 or 9 years; that she went to school part of the time, and was well clothed; but that *Anne Gathright* had repeatedly declared she did not intend to make any charge for her *board*.

With respect to the validity of the receipt for the 158*l.* 15*s.* 10 3-4*d.*; it was proved by the deposition of *John Farris*,

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that he always understood that *William Gathright* transacted the chief of his mother's business in the time of her being guardian for her granddaughter *Nancy Farris*; that he verily believed that *Anne Gathright* was herself incapable of "transacting the duty" which her guardianship required; and that he always understood that she was guardian to *Nancy Farris*, in the year 1777. It was also proved by the deposition of *William Farris*, (the administrator of *Sherwood Farris*,) that he took a receipt (without saying for what sum) of *Anne Gathright*, as guardian of *Nancy Farris*, for her proportional part of the money due her as orphan of the said *Sherwood Farris*; and that *William Gathright* did the business for *Anne Gathright*, as guardian of *Nancy Farris*, with the said deponent.

A transcript of the record in the suit referred to in the bill, was not inserted in the record sent to the Court of Appeals, but was afterwards brought up by *certiorari*; from which it appeared that a verdict had been found, (on an issue directed in that suit,) setting forth, "that the receipt in the following words, 'Received August 2d, 177—, of *William Farris*, 15s. 10 3-4d. for *Anne Farris*, orphan of *Sherwood Farris*, deceased, to remain without interest till January next, as the interest is settled till then.

'*William Gathright*, jun. for *Anne Gathright*.

'*John Warriner*, jun.'

was the proper hand-writing of the said *William Gathright*, jun.; and that he was empowered by *Anne Gathright* to receive money for her ward *Nancy Farris*, orphan of *Sherwood Farris*, deceased;" and a decree had been thereupon pronounced, allowing *William Farris* credit for the said sum of 15s. 10 3-4d. in the settlement of his account as administrator of the said *Sherwood Farris*.

The late Chancellor (on the 29th of September, 1803) "being of opinion that the plaintiff *Nancy* was not chargeable with board, nor entitled to interest for the use of the money claimed by the bill during such time as she abode in her grandmother *Anne Gathright's* family, adjudged and

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decreed that the defendants, out of the goods and credits of their intestates respectively, pay to the plaintiffs 158*l.* 15*s.* 10 3-4*d.*, with interest thereon, at the rate of five *per cent. per ann.* to be computed from the time when she ceased to be longer a member of that family : but, forasmuch as *data* for exactly measuring that period are not supplied, and the defendants are understood not to have admitted the things bequeathed to their intestates by the said *Anne Gathright* to have been her property, the Court directed one of the Commissioners to inquire into these matters, and report them, as they shall appear to him, to the Court, with the value of that property;" from which decree the defendants *William Savage* and *Hooper* and wife prayed an appeal, which was allowed them.

Nicholas and *Randolph*, for the appellants.

Wickham, for the appellee.

On behalf of the appellants four points were made ; 1. That *Anne Gathright* was never chargeable with the money decreed ; in support of which it was observed that the present defendants not having been parties to the suit against *William Farris*, the record in *that* suit was not admissible evidence in *this* ; independently of which record, there was nothing to prove the payment of the money but the deposition of *William Farris*, who was clearly an *interested* witness ;

2. That, if she was ever chargeable, the credit claimed for *board* ought to be allowed ; her declarations that she did not *intend* to charge it, not being sufficient to bar her *right* ;

3. That if the receipt were allowed, its true date was probably in the paper money times, and therefore the scale of depreciation ought to be applied, according to the cases

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ses of *Granberry v. Granberry*, (a) and *Call v. Ruffin*; (b) and,

4. That all the proper parties were not before the Court; as was evident from *Anne Gathright's* will.

(a) 1 Wash.
246.

(b) 1 Call, 333.

(c) 2 Wash.
215.

In answer to the first point, it was said that the record in the first suit was not introduced as absolute or conclusive testimony, but merely as introductory to, and explanatory of, the deposition of *William Farris*; that a copy of that record would have been no evidence before the Chancellor, since the papers being in his own Court, he should have looked into the originals. In the case of *Burk's Ex'r v. Tregg's Ex'r*, (c) such was the principle established on the plea of *nul tiel record*: and it would have been the same, if the copy in question had been *incidentally* produced as evidence to the Jury. In this cause, the bill referred to the papers in the other suit, *as now remaining of record in the Court*. This made them part of the bill, and authorized the giving them in evidence, so far as by the rules of law they were evidence; viz. to shew that such a suit *had been brought*, and such a decree *existed*; whereby it appeared that *William Farris* was *disinterested*; the decree in his favour having settled the matter as to him.

Even if the record was not read in the Court below, (as it should have been,) the Court here ought to inspect and receive it as evidence; this being an interlocutory decree, and this Court having obtained possession of the transcript by writ of *certiorari*; as, in *Alexander v. Morris*, (a) where the decree was interlocutory, depositions, taken *after the allowance of appeal*, were, nevertheless, admitted to be read in the Court of Appeals.

2. As to the *board*, the Chancellor has been liberal enough. Since it was evident that Mrs. *Gathright* never intended to charge the plaintiff *Nancy* with board, and held a considerable sum of money belonging to her, for many years; he, very properly, refused to make the one party liable for *board*, and the other for *interest*. Besides, if the *profits* of the orphan's estate were not sufficient for her maintenance, her

guardian had no right to consume the *principal* in expenses, but should have had her bound out according to law.(a)

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3. Whether the scale of depreciation ought to be applied, or not, does not appear. But, admitting that *paper* money was paid, the decree not being *final*, it will not be too late for the Chancellor to apply the scale hereafter. So also,

(a) 1 Rev.
Code, p. 173.
s. 11.

4. Proper parties may be introduced at any time before the final decree.

In *reply*, it was urged that a mere reference to another suit does not make it part of the bill, unless the record be *filed*, or made an *exhibit*; that the evidence necessary on the plea of *nul tiel record* is very different from that required in *Chancery* suits; that *copies* there are always received, and, indeed, are *most proper*, because the papers, and *those only*, which were before the Court below, ought to be inserted in the record to be sent to the Court above.

William Farris was not a competent witness; for, notwithstanding the decree was in his favour, he was not altogether discharged, since a bill of review might be obtained, and, therefore, he might, eventually, be interested.

As to the question of *depreciation*, the Chancellor will never allow for it, if this decree be affirmed; for he could not have got to the sum of 158*l.* 15*s.* 10 3-4*d.* without disallowing the depreciation.

Mr. *Wickam's* suggestion, that proper parties may be made *hereafter*, ought not to prevent this Court from *now* directing them. Is a man to be condemned unheard, because he *may be* heard hereafter? Principles are *now* to be settled. If this Court affirm the decree, its decision will be understood as declaring that all the proper parties are already made.

Friday, May 18. The Judges delivered their opinions.

Judge TUCKER. The first question in this cause respects the proof of the payment of the sum of 158*l.* 15*s.*

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10d. by *William Farris*, administrator of *Sherwood Farris*, deceased, to *Anne Gathright*, as guardian of the complainant, *Nancy Royster*, who was a daughter of the said *Sherwood Farris*. And the proof rests entirely upon the deposition of *William Farris* the administrator, by whom the payment is alleged to have been made. As it is short, I shall transcribe the *whole* as it appears in the record.

"Question by the plaintiff. Did you, or did you not, take a receipt of *Anne Gathright*, as guardian of *Nancy Farris*, for her proportional part of the money due her as orphan of *Sherwood Farris*, deceased, you being administrator of the said *Sherwood Farris*, deceased?"

"Answer. I did take a receipt, and I was the administrator."

"Question by the plaintiff. Did *William Gathright* do the business for *Anne Gathright*, as guardian of *Nancy Farris*, with you?"

"Answer. He did. And further he saith not."

Were there no objection to the *competency* of the deponent as a witness, I am clearly of opinion that this deposition, standing alone and unsupported by the *receipt* which he says he took for the money, (the amount of which is not mentioned, nor even hinted at,) ought to be wholly rejected as proof of such payment to the guardian.

But the objection to his *competency* appears evident upon the face of the deposition; for, as administrator of the father of *Nancy Farris*, he was chargeable to her for any legacy or distributable portion of her father's estate in his hands; and, consequently, could not be permitted to discharge himself by his own oath, only, that he had paid it over to her guardian.

But to remove that objection, the plaintiffs resort to a record in a suit between themselves and this witness, as administrator of *S. F.* in which the Chancellor directed an issue to be made up between the parties, to try whether *Anne Gathright*, (who was not a party in that suit,) on the second day of *August*, 1777, was the guardian of the plain-

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tiff *Nancy*, and also to try whether an exhibit in these words, "Received *August 2d*, 177—, of *William Farris* 158*l*. 15*s*. 10 3-4*d*. for *Anne Farris*, orphan of *Sherwood Farris*, deceased, to remain without interest till *January next*, as the interest is settled till then." (Signed) "*W. Gathright*, jun. for *Anne Gathright*," was undersigned by the said *W. G.*, jun. with his proper hand; and also to try whether the said *W. G.*, jun. was empowered by the said *A. G.* to receive money due to her ward; on which trial those facts were both found in the affirmative; which record is in part recited, and is referred to in the complainants' bill, in this suit, as then remaining in the same Court of Chancery. But that record was not made a part of the record in this suit, when sent up from the Court of Chancery, neither doth it appear that it was read in evidence there at the hearing. *Mr. Wickham*, however, contended, upon the authority of *Alexander v. Morris*, (3 *Call*, 104.) that, this being an appeal granted from an interlocutory decree, this Court would allow that record to be read; more especially as, being a record of the same Court, it was probable the Chancellor had inspected it previous to pronouncing his decree. But I have very great doubts of the propriety of such a practice, as it may be productive of great inconvenience and injury to suitors in general. For can it be thought reasonable, that a party, by referring in a general way to a suit between other persons, although in the same Court, should put his adversary to the trouble and expense of hunting for, and taking copies from the papers in a suit, or perhaps a dozen suits, determined twenty or fifty years ago, and, after all, perhaps not meeting with the papers referred to, when the party making the reference might have produced an authentic copy, and annexed it to his bill or answer, without further expense than paying for a copy of so much as he himself might deem material to his own cause. Or, suppose a person (against whom a decree may have been pronounced in any of the other Chancery District Courts)

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to apply to a gentleman of that bar for his advice whether to appeal from a decree or not. He produces the record certified by the clerk, and the counsel, upon examining it, discovers manifest error, and advises an appeal. If, upon an exhibit which shall afterwards be brought up by *certiorari*, as in this case, the Court shall affirm the decree, (although such exhibit was probably never produced in the Court below,) the defendant will be liable to pay damages at the rate of ten *per cent. per ann.* which he would never have incurred if the exhibit had been made a part of the record originally. I therefore think the practice too dangerous to be countenanced by this Court: more especially as, in the present case, the defendants have not *admitted* the payment, but called for *proof* to be made of it.

But, if it were admitted that this record might be read here for the purpose of shewing that the administrator is no longer liable to the plaintiff *Nancy*, and therefore a competent witness to prove the payment of her distributive part of her father's estate to her guardian, still I am of opinion it ought not to be admitted for any *other* purpose. Now the *amount* of the money paid to *William Gathright*, jun. as the agent of *Anne* his mother, nowhere appears but in that record. This Court certainly will not admit it for that purpose; for *Anne Gathright*, not being a party in that suit, had no opportunity to cross examine the witness; and, if we look into that record, he contradicts his own evidence in this cause; for *there* the money appears to have been paid to the son, who gave a receipt for it, and *here* the witness says that he took a receipt from (not that he *paid* the money to) the mother.

Again, if we are to inspect that record, it affords a presumption, at least, that the money was paid to the guardian during the period when paper money was the only circulating medium in this country; if so, it ought to be scaled according to the value, as established by the act of Assembly, within a reasonable time after the time of the payment.

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I also think the defendants are entitled to a reasonable allowance for board, as well as clothing and schooling, notwithstanding the generous intention of the guardian not to charge any. For the plaintiffs coming to ask for equity, ought to do it. Loose declarations are not to be attended to.

But, whether this be correct or not, she certainly has not waived her claim for moneys paid and advanced for clothes, schooling, and other necessary expenses, (board excepted,) an account of which ought to be taken, and all just and reasonable disbursements allowed out of the profits of the ward's estate, if sufficient for that purpose; but, if those profits, during that period of the ward's infancy when she was too young to be bound out as an apprentice, shall prove insufficient to compensate the guardian for such just, reasonable, or necessary disbursements, the balance ought to be made good out of the principal of her estate. But for advancements subsequent to that period, no allowance beyond the profits of the ward's estate ought to be made, unless it shall appear, that, from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of the guardian: in which case the same ought to be allowed out of the *principal* of the ward's estate, (if the profits thereof shall be found insufficient,) with interest on the same from the end of each year. And that, for any balance which may be found due to the ward at the period when she ceased to reside with her guardian, interest at the rate of *five per cent. per annum* ought to be allowed to the ward. And, in settling and adjusting the accounts, all payments and receipts of money, between the first day of *January*, 1777, and the first day of *January*, 1782, are to be considered as made in paper money, unless the contrary be proved; and the account stated in paper to the time of the last payment; and the balance either way reduced by the scale of that month, and carried to the account of subsequent specie articles if any there be. (a)

Upon the whole, I am of opinion that, upon the record

(a) *Taliaferro*
v. *Minor*, 2
Call, 196.

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now before us, there is neither evidence of the amount of any payment, nor of the time of any payment, nor even of the certainty of any payment made by *W. Farris* the administrator to *A. Gathright* the guardian; that the decree be therefore reversed, and the cause sent back to be proceeded in, in such manner as upon further evidence, if offered to the Court, may be consonant to equity.

Judge ROANE observed that the decree of the Court, about to be read, contained his sentiments, and he did not wish to add any thing to it.

Judge FLEMING. The difference in the opinions of the Judges being on two points only, I shall be short in my remarks, and confine them to these two points. 1. With respect to the sufficiency of the evidence to prove the receipt of the 158*l.* 15*s.* 10 3-4*d.* by *Anne Gathright*, guardian of the appellee, *Nancy Royster*, as in the proceedings mentioned. It appears to me that the record in the suit between *Farris* and *Farris*, in which the present appellees and another were plaintiffs, to call *Wm. Farris*, administrator of *Sherwood Farris*, deceased, to render an account of his administration of that estate, and in which the said administrator had a credit for the said 158*l.* 15*s.* 10 3-4*d.*, having been particularly referred to in the bill, and by the answer admitted to be truly stated therein, I have no doubt but that record was proper evidence in this cause. I am also of opinion, that *Wm. Farris* was a competent witness to prove the payment of the said 158*l.* 15*s.* 10 3-4*d.* to *Wm. Gathright*, as agent of *Anne Gathright*, guardian of the appellee, *Annie Royster*: he, being exonerated from any liability for the same, by the decree in the suit of *Farris v. Farris*, was a disinterested witness, and no exception was taken to his deposition.

2. With respect to the board of the appellee, *Anne Royster*, during her residence with her grandmother and guardian *Anne Gathright*, the latter was repeatedly heard to de-

clare she did not intend to charge her ward with board. And our act of assembly concerning guardians and orphans,^(a) declares that where the profits of an orphan's estate are not sufficient for his or her maintenance, such orphan, if a boy, shall be bound out until the age of 21 years, and if a girl, to the age of 18 years.* I am therefore of opinion, that the charge for board, beyond the profits of her estate, ought not to be allowed.

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(a) 1 Rev.
Code, 173.

The following was entered as the decree of the Court.

“ A majority of the Court is of opinion that there is no error in so much of the decree rendered in this cause as exempts the appellee *Nancy Royster*, from the charge for board, during the time of her residence in the family of *Anne Gathright*, deceased, her guardian and grandmother, in the proceedings mentioned, and provides for the ascertainment of the time when such residence ceased; nor in so much thereof as disallows to the appellees interest upon the money claimed by the bill, during the time of such residence; nor in so much thereof as decrees to the said appellees the sum of 158*l.* 15*s.* 10 3-4*d.*, with interest thereupon, at the rate of five *per centum per annum*, to be computed from the time when such residence ceased; (subject, nevertheless, to any deduction which may result from the effect of the principles and provisions declared by this decree;) the receipt of the said money not having been denied by the answer, and being established by the testimony.

“ The Court is also of opinion, that there is no error in so much of the said decree as provides for the ascertainment of the several and respective proportions of the estate of the said *Anne Gathright*, deceased, with the relative values of each, which came to the hands of the respective intestates of the appellants, chargeable with payment of the debt aforesaid, in order to a just and ratable contribution

*Note. See also, *ibid.* p. 332. s. 12.

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between them, severally, to the sum decreed. But inas-
much as it is not proved that the said guardian ever agreed
to waive her claim for moneys paid and advanced for the
clothes, schooling, and other necessary expenses of the said
Anne Royster, during her residence with her as aforesaid,
this Court is of opinion, that the same ought to have been
ascertained and allowed to the appellants, in so far as such
advances were suited to the estate and condition of the said
Anne Royster, and did not, after she came to an age to be
bound out, in the event of the profits of her estate being in-
adequate to her support, exceed those profits: unless it
shall appear that, from extraordinary circumstances, such
disbursements were unavoidable, without culpable neglect
on the part of her said guardian; in which case the same
ought to be allowed out of the principal of the said *Nancy's*
estate, if the profits thereof shall be found insufficient, with
interest on the same from the end of each year. And that
there is error in so much of the said decree as omitted to
direct such ascertainment and allowance; subjecting the
same, if need be, to the operation of the scale of deprecia-
tion.

The Court is further of opinion that, although the pay-
ment of the said 158*l.* 15*s.* 10 3-4*d.* to the guardian is estab-
lished as aforesaid, the particular date of such payment is
not ascertained, and that if, on inquiry, it shall be found to
have been made between the last day of *December*, 1776,
and the last day of *December*, 1781, the same is liable to be
reduced by the scale of depreciation, to be applied as on the
last day of the year in which such payment shall be found to
have been made; and, as a reasonable time ought to be al-
lowed a guardian to put the money of a ward out at interest,
six months from the time of the receipt of the said 158*l.*
15*s.* 10 3-4*d.* is hereby allowed for putting the same out at
interest; if it shall be found that the same was received
prior to the first day of *January*, 1777, and that the said
six months from the receipt thereof will extend to the
year 1777, when the scale of depreciation commenced, the

same shall be scaled at the rate of depreciation existing at the end of the said six months, from the time the same was received by the agent of the said *Anne Gathright*; and that the said decree is also erroneous in not having provided for such ascertainment, and eventual reduction, as aforesaid.

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“ The Court is further of opinion that, as by the will of the said *Anne Gathright*, made an exhibit in this cause, her sons *Miles Gathright* and *Joseph Gathright* were made her executors; and as it does not appear that their accounts of such executorship have ever been regularly made up, and the estate delivered over by them to the legatees mentioned in the said will; the said decree is also erroneous in not having made those who succeeded the said *Miles* and *Joseph Gathright*, now deceased, as executors of the said *Anne Gathright*, parties to this suit: and also, inasmuch as it appears by the said will that *Jane Gathright*, *Anne Gathright*, (now *Whitlock*,) *Anne Gathright*, the granddaughter, as also *Mitchell Farris*, (to whose rights the appellees have succeeded,) and the appellee *Anne Royster*, were also legatees in the said will, there is further error in the Court’s having proceeded to a decree before the three first were made parties to the suit; and in not making the last, *in her own right*, and *as representing Mitchell Farris*, to be also contributory to the sum decreed.”

“ It is therefore decreed and ordered, that so much of the decree aforesaid as is above declared to be not erroneous, be **AFFIRMED**; and that the residue thereof be **REVERSED**; that the appellees pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; and the cause is remanded to the Superior Court of Chancery for the District of *Richmond*, to be proceeded in pursuant to the principles herein before declared, in order to a final decree.”

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Alexander against Greenup.

1. A patent from the Commonwealth, containing a recital "that the land was *escheated* from a certain J. M. dec'd;" and granting the same, "by virtue of an *entry* made in the office of the late Lord Proprietor of the *Northern Neck*; and in consideration of the ancient composition of 1*l*. 5*s*. sterling paid by the grantee into the treasury;" is illegal and void, and not to be received as evidence of title on the general issue in ejectment.

2. The Commonwealth, under the existing laws, cannot grant *escheated* lands, without a previous inquest of office, and then not, (as *waste and unappropriated lands*;) upon *entries and surveys*; but upon *sales* by the *escheators*.

THE points in controversy in this case (which was originally an action of ejectment, by *Greenup v. Alexander*, in the District Court of *Dumfries*, for 205 acres of land, lying in *Loudoun County*) are set forth in a bill of exceptions filed at the trial; the most material parts of which are as follows: "Memorandum, on the trial of this cause the plaintiff's counsel produced and offered in evidence a writing purporting to be a patent to the plaintiff's lessor for the land in the declaration of ejectment mentioned, in these words: "*Beverley Randolph*, Esq. Governor of the Commonwealth of *Virginia*, to all, &c.; Know ye, that by virtue of an *entry made in the office of the late Lord Proprietor of the Northern Neck*, bearing date the 6th day of *April*, 1778, and in consideration of the ancient composition of one pound five shillings sterling paid by *Christopher Greenup* into' the *Treasury of this Commonwealth*, there is granted by the said Commonwealth unto the said *Christopher Greenup* a certain tract or parcel of land, containing &c., by survey bearing date the 17th day of *March*, 1788, lying and being, &c.; *which said tract or parcel of land was escheated from a certain Jonathan Monkhouse, deceased*; bounded, &c.; to have and to hold, &c.;" dated the 8th day of *December*, 1788; and endorsed, "*Christopher Greenup* is entitled to the within mentioned tract of land. *John Harvie. Re. L. Off.*" And the plaintiff produced no other title paper or writing in support of his title; whereupon the counsel for the defendant prayed the opinion of the Court whether the said writing or patent was *not void*; and also whether it ought

3. A patent may be declared void, for defects apparent on its face; without the necessity of resorting to a *scire facias* to repeal it.

4. *Quere*, whether, and from what Court, a *scire facias* to repeal a patent can issue in *Virginia*?

to be permitted to go to the Jury as evidence of the plaintiff's title.

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But one of the Judges was of opinion, and so instructed the Jury, that the recital contained in the plaintiff's patent above mentioned and referred to, was conclusive evidence that a title had accrued to the Commonwealth, by virtue of an inquest of escheat taken upon the death of *Jonathan Monkhouse* in the patent named; but permitted the defendant to give evidence of any title in himself, or those under whom he claims, paramount to the title of the said *Jonathan Monkhouse*; reserving the point of law, upon such evidence, (if offered and found by the Jury to be true,) for the further consideration of the Court: and the said Judge further instructed the Jury that the said patent was likewise conclusive evidence of a title derived to the plaintiff under the Commonwealth, unless the defendant should shew in evidence to the Jury a better title in himself, or those under whom he claims, derived from the Commonwealth since the said escheat in the plaintiff's patent mentioned happened; reserving the point of law upon such evidence, (if offered and found by the Jury to be true,) likewise for the further consideration of the Court.

The other Judge permitted the said patent to go in evidence to the Jury, on the question whether such patent was valid; with this instruction, that if they found that any part of the land contained within the bounds claimed by the plaintiff had been granted to any other patentee by an *elder* patent, they should state it; "reserving the question of law arising from that fact, as to the validity and effect of such second grant to *Monkhouse*, as operating, or not, on such grant to another person."

And thereupon, the counsel for the defendant further prayed the opinion of the Court, whether the *recital in the aforesaid patent*, that the land therein mentioned *was escheated* from *Jonathan Monkhouse*, deceased, is conclusive evidence, against the defendant, that the land *was duly and legally escheated*, and sold according to law, without pro-

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ducing the 'proceedings, or a copy thereof, of the escheat. To this the junior Judge answered, that he had already fully delivered his opinion upon that point. The other Judge instructed the Jury that the *recital of the escheat* from *Monkhouse* ought not to be considered as conclusive evidence of such escheat, or the best evidence that such escheat had been legally executed.

Verdict and judgment for the plaintiff; whereupon the defendant appealed.

This cause was argued, at *October* term, 1808, by *Botts* and *Randolph* for the appellant, and *Wickham* for the appellee; and, again, by the same counsel, at *March* term, 1810.

On the part of the appellant, it was contended, 1st. That the grant was void in itself; because, admitting the land to have *escheated*, an entry could not legally have been made for it as *waste and unappropriated* land; nor could the consideration money have been the ancient composition of 1*l.* 5*s.* sterling, but the sum for which the escheator sold it; neither did the act of 1785, c. 67.(a) authorize grants by the *Commonwealth* of lands which had *escheated*; but only of *waste and unappropriated* lands.

(a) 2 Rev.
Code, App.
No. V. p. 69.

2d. It was competent to the Court to adjudge it void without a *scire facias*. *Fraud* (which is a circumstance *dehors*) will vitiate a patent; and evidence of fraud may be given on the plea of not guilty. *A fortiori*, then, the Court may take notice of a defect apparent *on the face of the patent*. It is questionable, indeed, whether a patent *can* be repealed by *scire facias* in this country. In *England* the *scire facias* to repeal patents is a *prerogative writ*; and issues from the same authority from which the grant issued; that is, the patent is from the *Chancery*, and the *Chancery*

(b) 6 Bac.
111. Gwill's
edit. & note
there

repeals it.(b) But, in *Virginia*, what Court could issue the writ? The *executive alone* could repeal its own act; first, because the acting power is the natural one to repeal the

act; and secondly, because the judicial department would not be *distinct*, if it could mingle with the executive to repeal a grant from the governor. But *repealing*, and *adjudging void*, are different acts, with different effects.

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If a *scire facias* could issue, there would be no benefit, or policy in requiring it; being a tedious and expensive remedy, and coming after the evil has had its effect. For, if *Greenup* recovers, a *scire facias* and repeal of the grant will not restore possession to *Alexander*.

Any other illegal act of the executive, or of the register, can be inquired into *collaterally*. Why not, therefore, this? Even an act of the Legislature may be so adjudged void, on the ground of its being unauthorized by the constitution. Why then should not a *patent* be avoided on the ground of its being contrary to law. One of the cases fit for *scire facias* is where a junior patent issues for the same thing. (a) (a) 6 Bar. 111. Yet every day's practice is to declare the junior patent void, incidentally. (b) So, in England, if a patent authorize a nuisance, the nuisance is subject to prosecution, before the repeal. (c) (b) Haywood's Rep (N. C.) 128. 375. 497. (c) 6 Bar. 111.

3. If the patent was evidence that the title of *Monkhouse* was extinct, it was not *conclusive* evidence; for, at any rate, a judgment in favour of *Monkhouse* upon an inquisition of escheat would have falsified the recital. Neither was it legal evidence of that fact, which ought to have been shewn by the verdict of a *Jury*, upon such inquest.

4. The diversity of opinion between the Judges in the District Court did not take away the erroneous instruction by one of the Judges.

On the other side, in answer to the first point, it was said that the whole argument was founded on a mistake. These were not lands escheated to the Commonwealth, but to Lord Fairfax. If he allowed them to be treated as waste and unappropriated lands, the Commonwealth had no right to claim any thing more. The act of 1785 conveyed a

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complete title to all persons claiming under Lord *Fairfax*. The entry was made in his office, and must be presumed lawful at the time. The patent having been granted, every circumstance to give it validity ought to be presumed. A man, claiming title under the Commonwealth, and producing a grant, is not bound to go farther back, and shew his entry and survey. It has been decided, again and again, that Lord *Fairfax* had a right to lay down regulations for his office. He might have had *one* rule as to lands which had been cultivated and improved, and *another* as to lands which never had been cultivated.

The land here *might have been waste and unappropriated*; for it does not follow, from its having escheated from *Monkhouse*, that he had ever *occupied* it; or that the *legal* title had ever been vested in him: he might have had a merely *inchoate* right, as an entry, or survey; and such right might have escheated.

But, though not *waste*, the land might have been *unappropriated*; and that is sufficient; for, though the word *waste* is mentioned in the *preamble* to the 4th section of the act of 1785, c. 67. it is dropped in the *enacting clause*, which speaks of *unappropriated* lands only; and, according to 6 Bac. 381. words in a *preamble* are not necessarily to be extended to the *enacting clause*. The word "*unappropriated*," applied to all lands not specifically appropriated to the use of Lord *Fairfax*; as is evident from the act of compromise, passed *December 10th, 1796*; (a) and all the laws on this subject are to be taken together, so as to expound one of them by another. (b)

What law prohibited Lord *Fairfax* from granting out lands that had before been granted, if escheated? The Commonwealth had no right; because the title was acquired from *him*. If a grant, then, from *him* would have been good, merely on payment of the ancient composition money, (if he chose to accept *that* as full satisfaction for the escheated land,) why should not a grant from the Commonwealth be equally good? By the *entry* with Lord *Fairfax*, the ap-

(a) 2 Rev.
Code, App.
No. V. P.
(71) (72.)
(b) *Pickett v.*
Dowdall, 2
Wash. 106.
Johnson v.
Buffington,
Ibid. 116. *Cur-*
ry v. Burns,
Ibid. 121.

pellee obtained an *inchoate* right, and was entitled to perfect it, on paying the ancient composition money;(a) and, if the land was *not improved*, there was no reason to demand more. Whether this entry was made in the proprietor's office, or with the county surveyor, and returned to that office, makes no difference; under the act of 1782, c. 33. s. 3.(b)

The appellee, in this case, has the right of the *Commonwealth*, and of Lord *Fairfax* also. What preferable title can there be in the appellant?

Argument in reply. The plaintiff in ejectment is bound to make out a complete title; which has not been done in this case. It is said that the patent, *of itself*, proves his title. But we say, he should have shewn more than the mere exercise of *power*. The *right* in 1778 was in Lord *Fairfax*. It should have been shewn in what manner it travelled from *him* to the *Commonwealth*. Where the act of 1785 authorizes a grant of Lord *Fairfax's* land, it must be on a survey made and "returned into the late proprietor's office."(c) The case of *Pickett v. Dowdall*,(d) shews that the Lord Proprietor made a variety of regulations in his office, differing from those in the land-office of *Virginia*. Among others, there was one, that, if no survey was made in six months after an entry, the benefit of the entry was forfeited. Yet nothing is said in this patent about a *survey*; an *entry only* is mentioned.

Why did the law require the grants to be on surveys returned to the proprietor's office? Certainly, that it might be shewn whether the order had been renewed by the proprietor. What could not have been set up as a demand against Lord *Fairfax* cannot be a just title under the *Commonwealth*. In this case, the entry had run out when the Commonwealth came to operate upon this land; for the survey was seven years after the proprietor's death.

A patent is never good without reciting the consideration for which it issues. The act of Assembly expressly

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(a) Ch. Rev.
p. 92. Acts of
1779. May
session, c. 12.
s. 6.

(b) Ch. Rev.
p. 180.

(c) Act of
1785, c. 67. s.
4.

(d) 2 Wash.
106.

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requires this; that all who look at a patent may judge of its original validity. But, here, the recital was altogether defective. It did not state that any inquest of office had determined the land to have escheated; nor that it was sold as escheated land; so as to give a title to a purchaser.

Under the regal government, would any man have said the *King* could grant escheated land without an inquest of office? There was an escheator who held his inquests in every County. The governor gave a preference to the person applying for an escheat warrant: but every patent recited the inquisition and proceedings thereupon. This was a great security to the rights of the citizens; that their freeholds were not to be taken away but by *verdict*.

Was there any difference between the *Northern Neck* and the other parts of *Virginia*? This charter, which infringed the rights of the people, and sprang from nothing but an *intrigue*, ought not (above all others) to be favoured. Would the people of the *Northern Neck* have permitted the proprietor to seize their lands without an inquest? Would they yield that their rights should be different from those of the rest of the people?

In this case, the defendant, if he could have shewn himself the *heir* of *Monkhouse*, might have defeated the plaintiff. An heir may bring ejectment against a person holding by an escheat patent. Yet the Court instructed the Jury that the title under the patent was conclusive, unless the defendant could shew a title *paramount* to that of *Monkhouse*!

Curia adv. vult.

Saturday, June 2. The Judges* delivered their opinions.

Judge ROANE, after stating the case. With respect to the general question in this case, I take it to be clear that although a patent, perfect on its face, is only to be vacated for matter *aehors the patent*, by a proper and regular proceed-

* Judge TUCKER, having been one of the Judges in the District Court, did not sit in this cause here.

ing, yet that a patent may carry *on its face* intrinsic evidence of its own nullity, and be considered void, when exhibited in the progress of a trial. I will put the case of a patent obtained "for land now holden in fee by *A.*," or "for escheated land," (at this day under the Commonwealth,) in the ordinary way, as if it were waste and unappropriated land: in either case, it does not want *extraneous* evidence to shew, that the Commonwealth has been deceived in its grant, or rather has granted that which was not grantable at all in the first case, or, in the second, in that mode, or for that consideration, which the law of the country justifies. The recognition of a principle going to defeat patents perfect as upon the face thereof, on the ground of extraneous and latent defects, by a regular proceeding, does not conflict with another principle, that a patent which is defective *per se*, is to be held void, in the first instance.

In the case before us, admitting for the present, that the act of 1785 applies, for the purpose of perfecting entries for *escheated* land made in the time of Lord *Fairfax*; the question is, whether this patent is not void, as on its face; 1st. On the ground that it does not state that the escheat *preceded* the entry; and, 2dly. That it does not state that the escheat was regularly made *by an inquisition*. This last question is important; and I shall not now *decide* it, as there are other and plainer grounds on which I hold the judgment of the District Court to be evidently erroneous. On the one hand, it may be argued that the officers of the Commonwealth should be intended to have granted the patent on the proper documents only; and, on the other, it is a principle of our law, certainly not to be relaxed in favour of a Lord Proprietor, and greatly for the liberty of the subject, that the King cannot enter upon the lands of a subject upon mere surmises, nor without the solemn inquisition of a Jury.

As to the 1st objection, it is only stated that the land *escheated* from *Jonathan Monkhouse*, deceased. There is nothing in the patent to shew that this escheat happened

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Greenup.(a) 2 Bl.Com.
347.(b) 2 Wash.
106.

prior to the date of the entry; and the patent would be satisfied, if in fact that escheat had accrued after the entry, and before the date of the patent. I admit that my own opinion is, that, on a liberal scale of construction, the escheat must be *taken* to have been *prior* to the entry: but it is a rule, on the other hand, that patents are always to be taken in a sense most favourable for the King, and against the party. (a) Again, it is worthy of observation that the junior Judge in the District Court considered that the escheat had accrued *to the Commonwealth*, and therefore accrued *after* the entry; and, if so, the entry, on which the patent is grounded, was made at the time without authority; at a time when the land was actually *holden* by *Mont-house*. This is at least sufficient to shew that the patent is uncertain in this particular; so uncertain as that one of the Judges of the Court below expounded it, as to the time of the accruing of the escheat, in a sense which is equally in conflict with the ground taken by the appellee's counsel in this argument, and derogatory to the right of the Commonwealth to have granted the land by this patent; nothing being more clear than that lands accruing to *the Commonwealth* by escheat are to be granted away under a regular inquisition, and sale by the escheator, only, and in consideration, not of the ancient composition money, as in this case, but of the actual price for which the same has been sold by the escheator. In the case of *Pickett v. Dow-*

dall, (b) it was said by Judge *Pendleton*, that, in *subsequent* grants, the *prior* forfeiture of a former grant should be recited: and the reason of this was given by Mr. *Marshall*, one of the counsel: it is, that, if the *prior* forfeiture were not recited, the former grant might prevail over the latter. But it is doing nothing to make that recital, unless it appears that the forfeiture not only preceded the second grant, but also preceded the foundation on which the second grant was erected. In the case before us, if the escheat be taken to have accrued at a time posterior to the entry on which the grant is founded, although the grant in question

(having recited a forfeiture by escheat prior to *its date*) would prevail (*ceteris paribus*) against the original grant to *Monkhuse*, yet it does not follow that it would prevail against a grant to a third person, the inception as well as consummation of which, originated after the escheat had accrued; it does not follow that, as against other persons than those claiming under *Monkhuse*, it conveys *any* title; and, therefore, in an ejectment, in which the party recovering must shew a complete title, the grant was not on this ground proper to be given in evidence. *Greenup* ought not to have recovered against *Alexander*, when there might have been another person behind entitled to recover against him: the possession of *Alexander* ought only to have been divested in favour of the true owner.

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I have thus considered this case as if the act of 1785 related to entries for *escheated* lands: if it did, and the escheat could, on this patent, be taken to have been *anterior* to the entry, the title of the appellee would have been complete: but my opinion is, that that act relates only to *unappropriated* and *ungranted* lands.

This is evident both from the preamble and body of the act, taken in a general view. The preamble states the mischief contemplated to be remedied, to be, that no mode existed for granting out the *unappropriated* lands of the *Northern Neck*. It is argued, however, that the general term "*entries*," in the 4th section, (a) enlarges its operation so as to go beyond *unappropriated* lands, and to embrace entries for escheated lands. While it is admitted that the words of an enacting clause *may* go beyond the case stated in the preamble, it is the more natural construction, *ceteris paribus*, to consider them as merely coextensive therewith; as commensurate with, and calculated to remedy, the evil which gives rise to the act. But in the case before us, we do not stand merely on this *general* ground: admitting that the sense stated in the preamble was thus *enlarged* by the term "*entries*" as aforesaid standing singly, that term is again *restrained* by the following circumstances:

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1st. In using the said term "*entries*," the same clause speaks of "*surveys*" founded thereon: therefore entries for *unappropriated* lands must be meant, since surveys are not necessary on entries for *escheated* lands or lots: 2dly. The clause says that the grants on the entries and *surveys* made in the life of the late proprietor shall be made out in the same manner as is by law directed in cases of *other* unappropriated lands. This term "*other*" undoubtedly imports that the lands to which the entries in question relate, are also unappropriated lands. 3dly. The 5th section, which is confined expressly to *unappropriated* lands as to *future* grants, shews that the former section which related to *past* entries, is to be taken under the same restriction. 4thly. When it is considered that the same session put into force, in the *Northern Neck*, the act concerning escheators, by which the escheated lands, in that territory also, were to be sold for *full value*, the provision in the 6th section of the act in question shews that the land required by the *entries* mentioned in the act must mean unappropriated land; and, 5thly. The same inference is drawn from the provision in the 5th section respecting *caveats*, which, as well as *surveys*, are, by the general land laws of this *Commonwealth*, confined to *unappropriated* lands, and do not apply to *escheated* lands.

Upon the whole, while I doubt extremely (to say the least) whether this patent is not void, for the reasons assigned, supposing the act of 1785 to extend to entries of this character, (for escheated lands,) I am clearly of opinion, that the act applies only to unappropriated lands for which entries had been made; and being thus confined, I am of opinion that the instruction of the Court below was erroneous; that the patent ought not to have been received as evidence of the appellee's title; and that therefore the judgment be *reversed*.

Judge FLEMING. The principal questions in this case are, whether the *recital* contained in the appellee's patent,

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dated the 8th day of *December*, 1788, was *conclusive evidence*, that a title had accrued to the Commonwealth by virtue of an inquest of escheat taken upon the death of *Jonathan Monkhouse*, in the patent named; and whether the said patent was likewise conclusive evidence of a title derived to the plaintiff, under the Commonwealth, unless the defendant should shew, in evidence to the Jury, a better title in himself, (or those under whom he claims,) derived from the Commonwealth, since the said escheat in the plaintiff's patent mentioned happened? Such being the instruction given to the Jury at the trial in the District Court, as stated in the bill of exceptions.

On examining the records of the late proprietor's office of the *Northern Neck*, now in the register's office, I find, that, formerly, there was great solemnity used in obtaining patents for escheated lands; an instance of which I shall notice, in the case of land that escheated to the proprietor, on the death of *Frances White, alias Lampton*.

On the 3d *June*, 1729, *Dr. Thomas Turner* gave information by letter to *Thomas Lee*, the proprietor's agent, that one *Frances White, alias Lampton*, had been seised of about 50 acres of land in the County of *Richmond*, now *King George*, and died without heirs, or having disposed of the same; and prayed to have the preference of a grant thereof.

On the 7th of *April*, 1720, *Thomas Lee* issued his warrant to *Edward Barrow*, surveyor of *Richmond County*, empowering him to survey the said land, and return the survey and plat to the office, in the customary time; in which warrant the agent recited that *Turner* had obtained a certificate, and published and returned the same, according to the rules of the office. At the foot of the warrant there is a direction to *Turner* that "when you return your survey you must bring *Mrs. White's title*." signed *Thomas Lee*.

Next in order is a survey, and plat of the land, made by *J. Warner*, surveyor of *King George County*, the 27th

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of September, 1727, accompanied with *White's* title papers, to wit, a deed for the land from *Wm. Marshall* to *Thomas White*, late husband of the intestate *Frances*, dated the 24th of October, 1713, and the will of *Thomas White*, dated the 20th of April, 1715, in which he devised the land to his wife *Frances White*; who afterwards married one *Lampton*. Then follows the warrant of inquest from *Robert Carter*, agent of the proprietors, and escheator of all the lands in the *Northern Neck*, directed to *George Eskridge*, deputy escheator, dated the 9th of May, 1729, directing him to take an inquest of office on the said land; which was duly executed by the said deputy escheator, on the 4th of February, 1732, and returned to the proprietor's office. After which, a grant for the land issued to *Thomas Turner*, in which the foregoing proceedings are recited, as follows: "Whereas it hath been set forth to the proprietor's office by *Thomas Turner*, of the County of *King George*, that *Frances White*, alias *Lampton*, late of *Richmond*, now *King George County*, died seised of a parcel of land, situate, &c. without heirs, or making legal disposition thereof, which land is part of a tract granted unto *Wm. Marshall*, by deed out of the proprietor's office, dated, &c. for 268 acres, and was by the said *Marshall* sold unto *Thomas White*, by deed, dated, &c. and by the said *White*, by his last will, bequeathed unto his wife, the said *Frances White*, (afterwards married to one *Lampton*,) to her proper use and behoof for ever; whereupon the said land, for want of heirs of the said *Frances*, escheated to the proprietors; the said *Thomas Turner* moving to have the preference to a grant thereof, and an inquisition concerning the same being since taken, and returned to our said office, bearing date, &c. under the hand and seal of *George Eskridge*, gent. deputy escheator of our said proprietary; and, upon the oaths, and under the hands and seals of twelve lawful freeholders of the said County of *King George*, viz. *Thomas Berry*, &c. who brought in this verdict, viz. We do find that *Frances White*, alias *Lampton*, aforesaid, died seised of thirty-five acres of land ;

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that she left no heir, nor made any disposition thereof in her life-time that we know of, and that she was no alien at the time of her death, and therefore we find the said thirty-five acres of land escheat to the honourable proprietors of this *Northern Neck*, as by the said inquisition doth, and may more fully appear. Know ye, therefore, that for divers good causes, &c. we have given, granted, &c. unto the said *Thomas Turner*, &c. the said 35 acres of land, &c. lying, &c. and bounded as followeth; to wit: Beginning, &c. to the beginning. Together, &c. To have and to hold, &c. yielding and paying, &c. Provided, &c. Given at our office in *Lancaster County*, &c. Witness our agent and attorney fully authorized thereto, dated, &c.”

By this it appears that in the time of the proprietorship of the late Lord *Fairfax*, great ceremonies were deemed necessary, and were used in obtaining patents for escheated lands in the *Northern Neck*, but I have not been able to procure the form of an escheat patent, without that territory. It appears, however, that, in the times of the proprietorship of Lady *Culpeper* and Lady *Fairfax*, less ceremony was used in obtaining such patents, than in later times; as they had sometimes been used without a prior inquest of office; but still there was a particular recital of previous ceremonies having been observed, according to the rules of the office; as appears by the preamble of a patent issued to *Edward Turberville*; which is as follows: “*MARGURITTE LADY CULPEPER, Catharine Lady Fairfax*, Proprietors of the *Northern Neck of Virginia*, To all, &c. Whereas *Edward Turberville*, of the County of *Richmond*, hath set forth to our office, that *Randolph Davenport* died seised of 115 acres of land in the County of *Westmoreland*, and left no heirs behind him, nor did dispose thereof by will; whereupon the same escheats to us the said proprietors; and thereupon a certificate according to the rules of the office issued to make the same public, which being returned with an endorsement under the hand of *Thomas Sorrell*, Deputy Clerk of the said County, certifying that the same was duly

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published, and no person appearing to dispute the title, to the said escheat, and the said *Edward Turberville* moving to be preferred to escheat the same, Know ye, therefore, &c. that for divers good causes, &c. we, &c. have granted, made over, &c. unto the said *Edward Turberville*, &c. all our right, title, &c. in and to the said 115 acres of land, &c. situate, &c. and bounded, &c. To have and to hold, &c. yielding and paying, &c. Provided, &c. Witness, &c.

In the patent before us there is a bare *recital*, "that by virtue of an entry made in the office of the late Lord Proprietor of the *Northern Neck*, bearing date, the 6th. of *April*, 1778, and in consideration of the ancient composition of 1*l.* 5*s.* sterling paid by *Christopher Greenup* into the treasury of this Commonwealth, there is granted to the said *Christopher Greenup*, 235 acres and 30 poles of land, by survey, bearing date the 17th day of *March*, 1788, lying, &c. which said tract or parcel of land was escheated from a certain *Jonathan Monkhouse*, deceased, and bounded as followeth, to wit," &c. and the plaintiff produced no other title paper, or writing, in support of his title.

And all the evidence, that the land in question had escheated from *Jonathan Monkhouse*, is an assertion in *Greenup's* entry, that the said *Jonathan Monkhouse* dying intestate, and without any known heir, the said land, part of a tract of 625 acres granted to *John Hough*, escheated to the Lord Proprietor.

In the margin of the entry (as appears by a copy from the register's office) there is a note: "Advertisement issued, and entry and advertisement fees paid."

What were the rules in the proprietor's office, at the time *Greenup's* entry was made, we are not informed. But I find that on application at the office for a grant of escheated land, the first step was to advertise the same.

What further steps were necessary (according to the rules of the office) to entitle the petitioner to a grant we have no information. But, in the case before us, it does not appear that there was any publication whatever, or any

other-step taken by *Greenup*, between the date of his entry in 1778, and the survey in 1788, about eight months before he obtained a patent, which appears to me too defective to support his title to the land in controversy; and therefore that the instructions given to the Jury, as stated in the bill of exceptions, were erroneous.

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Judge BLACKSTONE, in the 3d volume of his *Commentaries*, page, 259. when speaking of the *inquests of office*, in *England*, observes, "that they were devised by law, as authentic means to give the king his right by solemn matter of record, without which he, in general, can neither take, nor part from any thing. For," says he, "it is part of the liberties of *England*, and greatly for the safety of the subject, that the king may not enter upon, or *seize* any man's possessions, upon bare surmises, without the intervention of a Jury."

If that be a sound general principle in *England*, where many of the people's rights must yield to prerogative, how much more forcibly does it apply, in our republican government?

Upon the whole, I concur in the opinion that the judgment be reversed.

Judgment reversed, and new trial awarded, with a direction, that "upon such trial, the Court below do not permit the patent to be given in evidence."

Tuesday,
April 17.

Fitzgerald, Executor of Jones, against Jones.

1. An executor having delivered up the estate generally and the management thereof to one of the residuary legatees, for his benefit and that of his co-legatee;— nine years and ten months having afterwards elapsed before he was summoned to render an account; the greater part of his executorship having moreover been during the revolutionary war; and the settlement taking place after his death; it was held *in reasonable rigour* to exact vouchers for many items in his account which appeared *probably* just, though not supported by proof.

IN a suit in the late High Court 'of Chancery, brought May 31, 1793, on behalf of *Edward & Richard Jones*, against *Daniel Jones*, executor of *Daniel Jones* their father, for a settlement of the accounts of his executorship, (which suit, having abated by his death, was revived against *Francis Fitzgerald*, his executor,) Master Commissioner *Rose*, to whom the said accounts were referred, reported a balance due to the estate of 479*l.* 4*s.* 10*d.* June 30, 1790; and subjoined the following observations: "Upon the foregoing account your Commissioner begs leave to remark that, after great delay, and much personal trouble to the defendant in procuring testimony, the accounts are submitted in their present form, though not so complete as could be wished; but, when it is considered that upwards of 27 years have elapsed since the defendant's testator qualified as executor to his father's estate, as also the situation of the country during the greater part of the time he acted in that capacity; to which may be added his being unacquainted with keeping regular accounts; it may appear rather surprising they should be so correct as they really are. The plaintiffs, by letter to your Commissioner, have excepted as follows: 'We object pointedly to every voucher that is not agreeable

2. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree: neither in such case ought interest to be allowed him on payments to the legatees before the decree; though made in bonds which carried interest.

3. Under circumstances a commission of 7 1-2 per cent. may be allowed an executor on all his receipts and disbursements; the real and personal estate having, in obedience to the directions of the will, been kept together and managed by him.

4. A wealthy testator having bequeathed *pecuniary legacies* to three of his daughters, to be paid them, "if the money could be raised by his estate by the time that either of them should marry, or come of age;" (without saying any thing about their maintenance or education;) it was held that they were entitled (notwithstanding their legacies) to maintenance and education out of the estate; at least while the legacies were not sufficiently productive.

5. On a settlement of accounts in a Court of Equity, a decree will be rendered against a plaintiff for a balance of account appearing due to a defendant.

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to law ; also to the price of the board ; also to the maintenance and schooling of our sisters, as the will does not provide for the same, and also to the charge he (*Daniel Jones*) made for his services ; and, in fact, we object pointedly to every thing but what the law allows.' All the charges supported by regular vouchers are marked thus ||. Many of the others are satisfactory from the affidavits herewith filed ; and many of the items could not be expected, from the nature of them, to be accompanied with any voucher. There are others, for which it is probable vouchers have been taken, but in the confusion of the times may have been lost or destroyed, and which the testator of the defendant, if living, could supply by other testimony, which the defendant cannot procure, not knowing where to apply for it : a circumstance which he flatters himself will be considered deserving the attention of the Court. The charge for services objected to above is made by the testator as follows : 'To the management of the estate and the plantations lying forty or fifty miles, seventy-five pounds per year, and I acted as executor ten years and four months ;' which would amount to 775*l*. As this charge is not supported by any testimony, it is rejected, and a commission of five *per cent.* allowed on the receipts in lieu thereof ; but, as this is no more than what is commonly allowed for receiving and paying money, your commissioner is of opinion, that a further allowance of at least 2 1-2 *per cent.* more ought to be made. The defendant's testator gave up the estate and the management thereof to the plaintiff, *Edward Jones*, on the 23d of August, 1782, which is stated for the information of the Court, to determine at what period interest ought to commence on the balance due to the estate."

To this report a great number of exceptions were taken by the plaintiffs ; among which the most remarkable were, in substance, as follows :

1. That no vouchers were produced for many items in the account, which might and should have been (as they contended) supported by vouchers.

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2. That sundry debts of moneys paid for the board, support, and education of three daughters of the testator, who were *pecuniary* legatees, (no provision for such board, &c. having been made in the will,) should have been deducted from their legacies, and not charged to the estate generally, so as to diminish the *residuum* bequeathed to the plaintiffs; though they did not object to what was charged for the use of two other daughters who had *specific* legacies given them in negroes, which continued with the estate until they married; because (the estate having been kept together under the management of the executor) those negroes were profitable by their labour.

3. That the tobacco made on the estate in the years 1779, 1780, and 1781, was short credited, being only 9,747*lbs.*; whereas it should have been at least 60 or 70,000*lbs.* more than that quantity.

The will, (admitted to record in *June*, 1772,) besides directing all the testator's just debts to be paid, and devising several large and valuable tracts of land to the *plaintiffs*, bequeathed to his daughter *Sarah* five negro girls, so soon as they could be purchased by means of the *profits* arising from his estate; (without *specifying* or *limiting* the prices to be paid;) to his daughter *Mary*, nine, and his daughter *Martha*, eight, negroes *by name*, and sundry articles of personal property; to his three daughters *Rebecca*, *Elizabeth* and *Prudence* 500*l.* each; to be paid them if the money could be raised out of his estate by the time that either of them should marry, or come of age; if not, then all the negroes not already bequeathed, with all their future increase, to be equally divided between his three last-mentioned daughters and his two sons the *plaintiffs*: but, if the money were raised by his executors for his three daughters, then the estate not already bequeathed to be equally divided between the said two sons only. The testator also desired that his son *Daniel Jones* (the executor) should keep all that he had *already* given him; also 20 head of cattle, 10 head of sheep, and two feather beds and furniture.

On the 13th of *March*, 1801, the cause being heard, the late Chancellor, Mr. WYTHE, delivered this opinion: " From the defendant's testator, who is reported to have given up the estate, and the management thereof, in *August* of the year 1782, to one of the plaintiffs, for the use, undoubtedly, not of himself only, but of his other brother also, and who doth not appear *until nine years and ten months thereafter* to have been summoned to render an account of his administration, the plaintiffs are with *unreasonable rigour* exacting vouchers, upon failure to produce which are founded many exceptions; especially when to circumstances, noticed by the Commissioner, may be attributed loss of papers, and when, too, some debits were of such a kind that, probably, they were incurred because, otherwise, the plaintiffs' property might have been sold for satisfaction of public demands, and for services performed on their estates for their benefit.

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" The sisters of the plaintiffs were entitled to maintenance out of their father's estate, notwithstanding their legacies; at least until the legacies were sufficiently productive, which doth not appear to have happened during their brother's ministration; towards which maintenance was exempt from contribution every part of what *had been* given to him by his father; except the additional legacies of cattle and sheep; of which the sisters (whilst they, with their brothers, were one family) are presumed to have shared the profits.

" The debits on account of *James Sturdivant*, and for the hire of slaves, (to which the plaintiffs have excepted,) are justified, one by the affidavits of *John Gooch*, *Richard Hayes* and *Richard Jones*, and the other by one of the exhibits, and by the affidavit of *Thomas Jones*.

" Exceptions to prices, alleged to be excessive, paid for slaves bought to satisfy legacies; to payments for corn and wheat alleged to have been provided unnecessarily; to sundry pretended miscellaneous omissions; are not sustained.

" The defendant's testator is not entitled to compensation over the *customary* commission; and *interest* upon

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what is due from him ought not to commence before the final sentence shall be pronounced.

“He ought to be debited with more than *five* hogsheads of tobacco in the year 1779, and the two next following years, if the affidavits of *Jeremiah Brown* and *Daniel Wilkes* are to be credited. With how much more he ought to be debited, a Jury (to be impannelled and charged before the District Court of *Petersburg*, upon trial of an issue to be joined between the parties,) this Court doth direct to inquire and say; whose verdict shall be certified by the Clerk of the said District Court.”

On the trial of the issue thus directed, the Jury returned a verdict “that the whole crop of tobacco made by *Daniel Jones*, the executor of *Daniel Jones*, deceased, on the plantation of the testator, devised to the complainants, in the year 1779, amounted to 30,450*lbs.* of *Petersburg* tobacco; that the whole crop made by him as aforesaid in the year 1780 amounted to 49,000*lbs.* like tobacco; two hogsheads of which, estimated at 2,300*lbs.* were destroyed by the *British* troops, at Col. *Brookings*, in *Amelia* County, in the year 1781, and before it was inspected; that the whole crop made by the said executor as aforesaid, in the year 1781, amounted to 40,500*lbs.* like tobacco; that, therefore, in these three years, the said executor ought to be debited 119,850*lbs.* *Petersburg* tobacco, which exceeds the *five* hogsheads mentioned in the Chancellor’s decree the quantity of 114,100*lbs.* *Petersburg* crop tobacco.”

Upon this verdict a report was made by Master Commissioner *Hay*, by direction of the Court; in which he valued the tobacco found by the verdict at 86*l.* 18*s.* 10*d.* charged the executor with that sum, and with the balance of 579*l.* 4*s.* 10*d.* stated by the former report; credited each of the plaintiffs with half the amount of the balance due by the estate of the defendant’s testator; and applied the payments which *Francis Fitzgerald* had made to each, according to certain documents produced, shewing a balance due to *Edward Jones* of 424*l.* 19*s.* 10*d.* and that *Richard*

Jones had been overpaid his share of the estate 36*l.* 2*s.* 6 1-2*d.* The Commissioner observed, that, "as the defendant was not to pay *interest* on the balances stated in the decree, *but from the date thereof*, he had not added interest on the payments to the plaintiffs, though most of them were evidenced by bonds bearing interest."

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The Chancellor, on the 6th of *October*, 1804, confirmed this report, and decreed, accordingly, "that the defendant, out of the goods, &c. of his testator, pay to the plaintiff *Edward Jones*, 424*l.* 19*s.* 10*d.* with interest thereupon at the rate of five *per cent. per ann.*, to be computed from that day until paid; that the plaintiff *Richard Jones* pay to the defendant 36*l.* 2*s.* 6 1-2*d.* with like interest thereon; and that the parties bear their own costs:" from which decree the defendant appealed.

Hay, for the appellant.

Call, for the appellee.

Wednesday, April 25th, 1810. The Judges pronounced their opinions.

Judge TUCKER. Mr. *Hay*, for the appellant, made the following objections to the decree.

1. Because certain payments made by the executor of *Daniel Jones* to the complainants, *pendente lite*, in bonds on which interest was due, ought to have been credited as the amount of principal and interest due at the time of the assignment or payment. This objection ought certainly to have availed the appellant, if the Chancellor had allowed interest on the sum decreed, *pendente lite*; but, as he did not, and the bonds all bear date posterior to the institution of the suit, I think there is no error on this point. And, though it appears that this mode of applying the credit was done by the Commissioner without any previous direction from the Court, yet being approved and sanctioned by the

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Court, it must now be regarded as the act of the Court, and not of the Commissioner.

2. Because *Daniel Jones*, the executor and manager of the plantations, ought to have been allowed something as *manager* as well as *executor*. And I very much incline to think that, where the management of an *estate* is thrown upon an executor, and the care and education of a family of children with it, that an executor ought to have a more liberal allowance than a bare commission of 5 *per cent.* upon his receipts or expenditures. In the present instance the testator left five children, apparently minors, who remained so many years. He charged his whole estate with the payment of his daughters' legacies, if it could be effected out of the profits before either of them married or came of age. To do this, the executor must do many things beyond what the duty of an executor in *ordinary* cases imposes. His personal trouble, and responsibility, under such circumstances, may be increased ten fold. He ought to be compensated accordingly, whenever it appears that he hath faithfully discharged this *extraordinary* duty imposed upon him by his testator. For, even under our law, the executor (*as such*) can have nothing to do with his testator's *real* estate after the end of the year in which he dies. After that period, he ought to be considered as something more than an executor, if the testator by his will entrusts him with the management and care of his family, and his real estate, in general. But, in the present instance, the executor, from some cause or other, perhaps incapacity, has not kept such regular accounts of his transactions, as to entitle him to any considerable further allowances for his *extra* services. And, upon that ground *only*, I was inclined to think the decree right in allowing him only five *per cent.* on the amount of his account as settled by Commissioner *Rose*. I am, however, disposed to concur in the opinion of the other Judge, that he ought to be allowed 7 1-2 *per cent.* In a statement since received from Mr. *Williams*, in the case of *McCall v. Peachy*, it is stated, that

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this Court, in a decree made in that suit *May* 21, 1798, allowed a commission of ten *per cent.* to the executor, on the money received by him for the use of the estate, including debts, *sales* and *profits*, in full satisfaction for receiving, putting out, and paying away the said money, and for his *services* in the administration and *management* of the testator's estate. But, as there is a *debit* against him in consequence of the verdict of the Jury for a large quantity of tobacco, supposed to be made in the year 1779, 1780, and 1781, upon which Commissioner *Hay* seems not to have allowed any commission, I am of opinion that the decree is so far erroneous, and I also agree, that a commission of 7 1-2 *per cent.* be allowed on the net balance of that tobacco also.

3. Mr. *Hay* objects to the decree, because the Chancellor was mistaken in supposing that 5 hogsheads of tobacco, only, were credited to the estate for the year 1779, 1780, and 1781, and therein he is clearly right; there being 8 hogsheads weighing 9,747*lb.* net, so credited, which ought to be deducted from the 119,850, found by the Jury to have been made in those years, the whole amount of which is charged to the estate in the account by Commissioner *Hay*. There are other very important deductions which I conceive ought to be made from the quantity of tobacco so found by the Jury to have been made in those years. For they find the whole crop made in 1779 amounted to 30,450*lbs.*; that the whole crop made in 1780 amounted to 49,000*lbs.*, two hogsheads of which estimated at 2,300*lbs.* were destroyed by the *British* troops in 1781; and that the whole crop made in 1781, amounted to 40,500*lbs.* These three quantities amount to 119,950*lbs.* They then proceed to say "that they find that in those three years *Daniel Jones* ought to be debited 119,850*lbs.* of tobacco, which exceeds the five hogsheads mentioned in the Chancellor's decree 114,100 hogsheads, *Petersburg* crop tobacco." It is apparent from this, that the Jury neither deducted the 2,300*lbs.* contained in the two hogsheads, which they ex-

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pressly find to have been destroyed by the *British* troops in 1781; nor yet made any deduction for the overseers' shares, which, according to the evidence in the former part of the record, appear to have been usually a seventh or an eighth part. Supposing it an eighth, which is the lowest, the overseers' shares would have amounted to 14,981*lbs.* which with the 2,300*lbs.* destroyed by the *British* troops, and the 9,747 credited in the accounts settled by Master Commissioner *Rose*, form an aggregate of 27 or 28,000*lbs.* of tobacco, which ought to be credited the executor, against the 119,950*lbs.* the *whole* amount of the several crops for those three years, as found by the Jury. For the balance the executor ought to be charged the same rate that Commissioner *Hay* has allowed for the whole of those crops, as found by the Jury, deducting therefrom all reasonable expenses of the transportation to *Petersburg*, and warehouse expenses; and a commission of seven and a half *per cent.* as before mentioned.

4. Mr. *Hay's* fourth objection to the decree is, that the value of the tobacco found to have been made in those three years, by the Jury, has been arbitrarily fixed by the Commissioner, instead of being ascertained by evidence, as it ought to have been. It certainly does not appear by what means, or by what evidence, the Commissioner fixed the price. Mr. *Hay* said it was 20*s.* per cwt.; in this he was mistaken. Of the tobacco credited in Commissioner *Rose's* account made and sold in that period, three hogheads are charged at 70*l.* per cwt. the scale of depreciation being at that time 74 for one. Five other hogheads are credited at 75*l.* per cwt. when the scale of depreciation was at 90 for one. These prices reduced to specie are rather higher than the average price which the Commissioner has adopted. I am therefore unwilling to disturb his estimate; though, from my own recollection of that period, I am persuaded his estimate is not *too low*, and possibly may not be *too high*.

Mr. Call, for the appellee, complained of the liberality of Commissioner *Rose*, and the Chancellor, in respect to the accounts stated by the former; but I think without sufficient reason. I am therefore of opinion that, after correcting the errors which I have pointed out, the residue of the decree ought to be affirmed; and that the cause be remanded to the Court of Chancery for a final adjustment of the accounts between the parties, (one of whom has been already overpaid,) upon the principles which I have mentioned.

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Judge ROANE concurred that the decree be reformed in the points expressed in that about to be pronounced by this Court. He did not deem it necessary, or proper, to go into any *calculations*, which were more properly the business of a Commissioner. As to the compensation to be allowed the executor, he thought that, under the particular circumstances of this case, the estate having been directed to be kept together, which imposed additional labour on the executor, he was reasonably entitled to a commission of seven and a half *per cent*.

Judge FLEMING gave no opinion on the subject of commissions, being personally interested in that question; but in other respects concurred with the rest of the Court, and read the following as their joint opinion.

“The Court is of opinion that the said decree is erroneous in this; in affirming the verdict of the Jury impanelled to ascertain the quantity of tobacco made on the estate of the said *Daniel Jones*, the elder, in the year 1779, 1780 and 1781, and the report of Master Commissioner *Hay* thereon; by which verdict it is found that the quantity of 119,950*lbs.* of tobacco was made on the said estate in those three years; for which the said executor was debited, and against which he had credit for only 5,850*lbs.* of tobacco; when he ought to have had credit for 9,747*lbs.*, with which the said executor charged himself in his administra-

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tion account in the years 1779 and 1781; and a further credit for two hogsheads of tobacco, net weight 2,300lbs.; which the Jury found to have been destroyed by the *British* troops, at Colonel *Brooking's*, in *Amelia* County; and a further credit for the overseers' share of the said 119,950lbs. of tobacco; and also a further credit for the costs of transporting the said tobacco from the plantations to the inspections at *Petersburg*, and for the warehouse expenses of the same: Therefore it is decreed and ordered that the decree be reversed, &c. and that the cause be remanded to the said Superior Court of Chancery for an account to be taken, and a final decree to be entered, according to the foregoing principles; in which account so to be taken the executor is to be allowed *seven and one half*, instead of *five per cent.* on the receipts and disbursements of the whole estate of the said *Daniel Jones* the elder."

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Neither consent, nor long acquiescence of parties can give the Court of Appeals jurisdiction. An appeal, therefore, (having been improvidently granted,) was dismissed on motion, five years after it was entered on the docket.

IN this case a decree was rendered in the Superior Court of Chancery for the *Richmond* District, *March* 16, 1804, dismissing the bill with costs; from which decree the plaintiff prayed an appeal, which was allowed him "on his entering into bond with sufficient security in the Clerk's office of the said Court, for the prosecution thereof, on or before the *first day of the next term.*" This he failed to do; and, the 6th of *October* following, on his motion by Counsel, and for reasons appearing to the Court, further time, until the ensuing first day of *February*, was allowed him for giving the said bond and security; which he did accordingly, as certified by the Clerk of the Court of Chancery.

A copy of the record was sent to the Court of Appeals, and the cause entered on the docket, *April* 4, 1805.

At March term, 1810, a motion was made by *Wickham*, for the appellee, to dismiss the appeal, as improvidently granted; the power of the Chancellor over it having ceased on the first day of the term ensuing his final decree; according to the case of *Anderson v. Anderson*, 2 Call, 180.

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Randolph, contra, insisted that this objection was now too late, nearly five years having elapsed since the appeal was docketed. The appellee having acquiesced so long in the bond given by the appellant, must be considered as *consenting* to receive it, as executed in due time.

Judge TUCKER observed, that consent could not give this Court *jurisdiction*; and referred to *McCall v. Peachy*, 1 Call, 55.

Wednesday, March 28th. The Judges pronounced their opinions unanimously, that it was a hard case; but the appeal must be dismissed.

On the last day of that term, this order of dismission was set aside, and the case further considered.

Tuesday, May 22d. The Judges again pronounced their opinions.

Judge TUCKER. The question arises upon that part of the chancery law, (a) which authorizes the Chancellor to grant an appeal in vacation *next after the term* when the decree shall have been rendered. (a) 1 Rev. Code, c. 64. s. 59.

This is a question of *jurisdiction*, not of *discretion*. All the powers of this Court are *statutory*; it has no claim whatever to power from any other source; neither custom, prescription, long usage, or precedent, have any pretensions here, independent of statutory provisions. This has been repeatedly acknowledged in the cases of *McCall v. Peachy*, *Bedinger v. the Commonwealth*, and *Stras v. the Commonwealth*. The time and manner of proceeding in order to

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give this Court cognisance of the cause, is, I conceive, as essential as the nature, or amount of the matter in controversy. If the party suffers it to elapse without proceeding as the law directs, he is as much concluded thereby, as he would be by a verdict for 99 dollars 19 cents damages, instead of 100 dollars, which is the lowest sum of which this Court can take cognisance. Until the Court has *legal* possession of any cause, although it be upon their docket, it has no power over it, but to dismiss it. *Jurisdiction* must in all cases precede *discretion*. In the present case, I conceive, we have not the former, and therefore that we cannot exercise the latter. My opinion therefore is, that the order of dismissal be reinstated.

Judges ROANE and FLEMING were of the same opinion.

The order for dismissal was therefore reinstated.

Munford.
1m 162
91 345
1m 162
103 84

Argued April
26th, 1810.

Clay against White and others.

THIS was an action of ejectment, in the District Court of New London, for 342 acres of land lying in Pittsylvania County. The Jury found a special verdict, stating the following facts :

John Fox obtained a patent from the Commonwealth for the land in question, on the 8th of July, 1780. In his will, *so facto* confers *seisin*.

2. Such *seisin* may be transferred and continued by deed of *bargain and sale*, or by *devise* : but a person, whose *seisin* is interrupted by the actual entry and *adverse possession* of another, cannot, *while out of possession*, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.

3. The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the Jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, *part* of the tract sued for ; and do not specify the *boundaries* of such part with so much precision as that possession thereof may with certainty be delivered ; a *venire de novo* ought to be awarded.

dated *August 5, 1780*, and admitted to record, *May 7, 1785*, there is the following clause; “ *Item*, my will is that all my land shall remain under the care and direction of my wife, to be given to, and divided amongst, my sons, *John Fox, W. Fox, T. B. Fox, and Henry Fox*, in such manner and proportion as she shall think fit; as they, or either of them, attain to the age of twenty-one, or marry; which shares or proportions of my said lands, so given to such child or children, I give to either, and all of them, and to his or their heirs and assigns for ever.” *Anne Fox*, the testator’s widow, on the 20th day of *June, 1799*, by indenture reciting the devise, and that *Henry Fox*, one of the testator’s sons, had attained his age of twenty-one years, “ in pursuance of the bequest and authority thereby given to her, and in consideration of natural affection, an d of five shillings to her in hand paid by the said *Henry*, did give, grant, bargain and sell, alien, enfeoff and confirm, to the said *Henry* one tract of land, in the County of *Pittsylvania*, containing 342 acres; describing the bounds, as in the patent; and reciting that the testator *John Fox* died seised and possessed thereof, in fee-simple: which deed was proved in *Gloucester County Court*, and certified to the Court of *Pittsylvania County*, where it was admitted to record in *July, 1799*. On the same 20th of *June, 1799*, *Henry Fox* (in consideration of 300 dollars,) sold and conveyed the same land to *Matthew Clay*, the lessor of the plaintiff, by deed of bargain and sale, which was duly recorded in *Pittsylvania County Court*.

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According to a survey, made in the cause, (in presence of the parties, and set forth in the verdict,) the lands in controversy contained 440 acres; beginning as in *Fox’s* patent, and running one or two courses nearly corresponding with the lines thereof, and some others apparently the same, or nearly so; and including a survey of 350 acres made *August 2, 1788*, for *William White*, one of the defendants; in whose favour a patent duly issued from the Commonwealth, on the 25th of *February, 1792*, “ for 350

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acres of the land in controversy;" which patent recites that, "in consideration of the ancient composition of one pound fifteen shillings sterling, there is granted to the said *William White* 350 acres of land, by survey," &c. the lines of which are recited, and do not appear to bear any relation to, or conformity with, those in *Fox's* patent.

The verdict farther stated that the said *White* had been in possession of the said 350 acres ever since the date of his patent: but "*whether any of the before named persons were in actual seisin of the land other than is stated above, the Jury did not know.*" They found the lease, entry and ouster in the declaration mentioned, and concluded in the usual form.

The District Court gave judgment for the defendants; from which an appeal was taken to this Court.

Hay, for the appellant. The District Court appears to have given judgment for the defendants on the authority of *Tabb v. Buird and others*, 3 Call, 475.; according to which, a person not in possession cannot convey by bargain and sale such a title as will enable the bargainee to recover in ejectment against another holding by *adverse* possession. But the facts in this case do not justify the application of that authority to it. The lines of *Fox's* patent are expressly stated to contain 440 acres, and include the 350 acres of land granted by *White's* patent. The Court, by misapprehension, thought that *White* was in possession of the whole land claimed by *Clay*; supposing 350 acres to be *all*: but surely *Clay* had a right to recover the difference between the 440 acres and the 350; though he had no right to recover the 350 acres. The obscurity of the survey and verdict misled the Court; and a *venire facias de novo* ought to be awarded, to ascertain the lines of the smaller patent within the bounds of the larger. *Clay* was entitled in equity to the whole 440 acres; and in strict law to the 90 acres only. But he ought to have recovered the latter at any rate.

McCrae and *George K. Taylor*, contra. There could be no ground for this. Either *White* was in possession of the 350 acres *only*; or of the *whole* land. If the former was the case, the plaintiff could not set up a claim against him for the 90 acres which he had not in possession. The case of *Goodright, Lessee of Balch, v. Rich*,^(a) shews that confession of lease, entry and ouster does not conclude the question of *possession*; that, if the *defendant* be not *actually in possession*, judgment ought not to be given against him; and that the *plaintiff* ought to prove that the defendant is in possession.

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(a) 7 T. R.
327.

Here the declaration claims only 342 acres. There is nothing to prove that *White* was in possession of more than his patent warranted. If he had had *nothing* in his possession, claimed by *Clay*, there could be no doubt that *Clay* could not have recovered against him: and the same reason applies to these 90 acres.

But, if *White* was in possession of the 90 acres, on the same ground that the plaintiff's title failed as to the 350, it fails as to the 90; for the possession is equally *adverse* in both cases.

No possession is found in *Clay*, or those under whom he claims, except so far as the *deeds* might be construed as carrying possession.

Hay, in reply. Nothing is said *positively* as to the possession of the 90 acres. *Clay's* title to the whole 440 appears. But, according to *Tubb v. Baird*, he cannot recover the 350 acres *in this form of action*. The question in *Term Reports* did not arise on a special verdict; but at the trial; being whether the defendant could be admitted to prove himself *not* in possession, or whether the plaintiff was bound to prove him *in* possession. No such question arose here. It would be inconvenient to transfer the doctrines *recently* established in *England* to this country. This is not a rule of *property*, but of *practice*; and, even in that country, the rules are different in different Courts.

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The verdict here is too defective to enable the Court to decide the whole case. There are *other defendants* besides *White*. *Hardy* and others, also confessed lease, entry and ouster. They may be in possession of the 90 acres. The Jury ought to have said *who was* in possession of them.

Taylor. This is a new objection. Either *White* is in possession; or he is not. If he is *not*, the law is clearly in our favour. If he *is*, the Jury were not bound to state the title of the *defendants*; for the plaintiff must recover by the strength of his own title; not by the weakness of the *defendants'* title. The plaintiff's title is clearly defective according to *Tabb v. Baird*; it appearing that the person of whom he bought *never was in possession*. The Jury's stating farther the adverse possession of *White* was altogether surplusage.

Saturday, May 28th. Judge FLEMING informed the counsel, that an argument was requested on the following point; "whether the bare obtaining a patent for land is to be considered as giving *seisin* to the grantee?"

(a) *Ch. Rev.*
p. 98. 1 *Rev.*
Code, p. 142.
s. 5. p. 147. s.
43. and p.
148. s. 44.

October 29th. *Hay* maintained the affirmative; relying especially on the language of the several acts of assembly concerning the land office; (a) from all which it appears to have been the intention of the legislature to grant an absolute unconditional *title* to the patentee.

He suggested as a proposition, whether a conveyance by record is not equal to *livery*. In *England* there are two kinds; a *fine* and a *common recovery*. By either of these a complete title (which according to *Blackstone* is *juris et seisinæ conjunctio*) is transferred, and no entry is necessary to perfect it. A patent under the great seal is of equal dignity: for in 5 *Co.* 94. b. (b) the doctrine is laid down, *totidem verbis*, that letters patent under the great seal amount to a *livery in law*. So in *Bac. Abr.* tit. *Prerogative*, and

(b) *Bar-*
dick's case:

17 *Viner*, 95. it is said that a grant of a reversion by the king is good without attornment. If such would have been the effect of a grant under the regal government, he could see no reason why a patent granted by the Commonwealth should not have the same effect.

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Every principle of public convenience requires that this position should be held to be true: and, when we advert to the situation of this country, it is peculiarly necessary. To take actual possession in many cases would be extremely difficult. The patentee must take witnesses with him; and by their subsequent death or removal might be prevented from recovering, though he had the oldest patent.

If a patent were not sufficient without actual entry, it might often happen that a younger patent would take precedence, and the claimant under the older patent be driven to a suit in Chancery. But the uniform understanding of the people of this country is, that the patent *itself* gives complete title, and enables the patentee to maintain any action whatsoever.

George K. Taylor, contra, did not contradict Mr. *Hay's* position that the act of assembly gives a title: but the question is whether that title is of itself sufficient to enable a party to maintain his action without actual possession. The legislature has indeed declared that actual possession need not be proved to maintain a writ of right; (a) but this does not extend to *ejectment*; for *exceptio probat regulam*. It would seem a fair inference from that act, that, if it had not been passed, proof of actual possession would have been necessary in a writ of right.

(a) 1 Rev.
Code, c. 12. s.
29.

The case then stands as influenced by decisions in *England* alone. The authority of *Barwick's* case is admitted; but it only proves that a patent amounts to a livery *in law*. Now it is clear that a livery *in law* is not sufficient without actual possession. 3 *Bac. Abr.* 146. (*Gwill.* edit.) tit. *Feoffment*.

Cur. adv. vult.

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Thursday, April 19, 1810. The Judges delivered their opinions.

Judge TUCKER (after stating the case) proceeded as follows: Mr. *Hay* admitted that, after the decision of this Court in the case of *Tabb v. Baird*, 3 Call, 475. and *Duval v. Bibb*, *Ibid.* 362. he could not support the plaintiff's title, under the deed of bargain and sale from *Henry Fox*, to maintain an ejectment for so much of the land in controversy as was found by the Jury to have been in possession of the defendant at the time that conveyance was made; but contended, that, if the verdict contained sufficient certainty to ascertain the bounds of *White's* 350 acres, judgment ought to be rendered for the plaintiff, for the remaining 90 acres; or, if the verdict be too uncertain for that purpose, there ought to be a *venire de novo*. I am of that opinion; for, if *John Fox*, the testator, was capable of devising this land, (of which hereafter,) *Henry*, his son, must be considered as taking under the devise, and not merely under the deed from his mother, which was intended to be, and was in fact, an appointment by her, under the power given by the will, and not a conveyance of any interest from herself, though both the considerations of natural love and affection, and of five shillings in money, are also mentioned therein. Whether *Mrs. Fox* the mother ever entered upon these lands confided to her care does not appear, and is not material to this part of the case. But the patent to *White*, and his actual and continued possession of the lands from the date thereof in 1792, either vested in him a rightful, or wrongful possession adverse to the title of *John Fox*, and of all claiming under him; so far as that possession actually extended; but no further. For it would be a most mischievous construction, indeed, to suppose, that the entry of a disseisor upon one hundred acres of land, part of one thousand; or more, would prevent the owner from conveying away the residue, to any other person he might think proper. Here the Jury have found the lands in controversy

(meaning, I presume, the lands comprehended within the lines of *Fox's* patent) to contain 440 acres, and that *White's* survey contains only 350 acres; the amount, though not the precise bounds of the disseisin, or ouster, are therefore shewn by the jury: and they ought to have discriminated between the lines of *White's* patent and that of *Fox*, which the surveyor, in his report, alleges, covers and includes the former; *Fox's* deed to *Clay* not being impeachable for the surplus.

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Mr. *Taylor*, for the appellee, cited the case of *Goodright, Lessee of Balch, v. Rich*, 7 T. R. 327. to shew that the plaintiff is not entitled to a verdict for those ninety acres, because he is bound to prove the defendant in possession of the whole of the premises which he seeks to recover. Without examining the doctrine laid down in that case, to which, as at present advised, I cannot subscribe, and to which the cases of *Smith v. Mann*, and *Jesse v. Bacchus*, cited in *Buller's Ni. Pri.* 110. perhaps afford a proper answer; the reply of Mr. *Hay*, that the Jury have in this case expressly found the lease, entry and ouster in the declaration mentioned, is, in my opinion, sufficient to obviate the objection, were such an obligation as Mr. *Taylor* contends for admitted.

We come now to the question suggested by a member of the Court, whether a patent from the Commonwealth be equal to an actual seisin; or, as I understood the question, whether a patent only confers a complete title to lands derived from the Commonwealth; without an actual entry into the same and corporeal possession thereof, or not.

That an entry is not always necessary to give seisin in deed, appears from the cases cited by Mr. *Hargrave, Co. Litt.* 29. a. note 3.(a) In England, letters patent under the great seal amount to a livery in law.(b) In this country, where grants of waste and unappropriated land only are generally made, as in the present case, I should suppose a grant of such lands from the Commonwealth, under the seal of the state, must be considered as tantamount, not

(a) Co. Litt.
15. a. 3 Atk.
471. 3 Wilson,
516. Newman
v. Newman.
(b) 5 Co. 94.
Barwicke's
case.

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only to a livery *in law*, but to a livery *in deed*. For the lands, previous to the patentee's location, must have been *waste and unappropriated*, or they could not have been granted. The patent conveys all right and title whatsoever out of the Commonwealth: there is nothing in our law which implies a forfeiture in case of *non-entry*; whatever might have been the construction when certain improvements were required to be made within three years; there is no ground to suppose the Commonwealth can ever gain a right to the lands, so granted, again, but by escheat for want of heirs, or by forfeiture for nonpayment of taxes; the right of the patentee must then be supposed to be complete and absolute. The patent is the symbol of his possession, as well as of his title. And any person entering upon that possession must be a trespasser or a disseisor. If the King enters into lands without title, or seizes lands by a void and insufficient office, he is no disseisor, (because of his prerogative,) but the freehold remains in the former owner; but if the King, by letters patent, grant the lands into which he has so entered, or has so seized, without title, if the patentee enters, he is a disseisor. (a) If the King grant lands to one, and, before he enters, another person enters and keeps the possession until he dies, and dies seised; and the lands descend to the heir of the disseisor; yet may the patentee enter; for his entry is not taken away by the descent in this case. (b) Upon common law principles, then, I am of opinion that an actual entry into waste and unappropriated lands granted by the Commonwealth is not necessary, in order to complete the patentee's title thereto; but that the same is, upon the delivery of the patent, absolute and complete for every purpose whatsoever, whether to maintain an action, or to transmit an inheritance, or to grant the same by deed, or by last will and testament.

(a) Bro. Abr. tit. 'Disseisin' 65. & Bac. Abr. 'Prerogative,' ad finem, p. 214. old edit.

(b) Co. Litt. 240. b.

Other reasons, I think, may be drawn from the nature and situation of the country; constant usage from its first settlement; and some particulars in our laws.

All the lands in *Virginia* have been originally granted

as vacant lands. Whatever might have been the policy at the first settlement of the colony, large and extensive grants were made soon after.

With the revolution, it became an object to raise a revenue from the sale of vacant lands, without requiring any actual settlement or cultivation. Millions of acres were disposed of to purchasers from all quarters upon those terms. It was impossible to calculate upon an increase of population commensurate with such extensive grants. All that the Commonwealth required of the patentee was the payment of his taxes upon the lands thus acquired. That done, the law had no other claim upon him. Why then must he make an actual entry? His patent was evidence of every thing that could be the object of such an entry. It was founded upon an *actual survey*; for making which *he paid all the expense*; this survey was founded upon an *actual location*, made, or supposed to be made, by himself or his agent. His land-warrant was his authority for so doing; and his entry in the surveyor's books; the subsequent survey made pursuant thereto; and, finally, his patent, were all so many evidences, in succession, of these facts: If the possession of a lessee for years, at common law, be construed as the possession of him that hath title to the freehold, (without entry, or receipt of rent,) so as to make a man tenant by curtesy of his wife's estate, (a) surely these acts done by the patentee or his agents, (though preparatory to a patent, instead of being subsequent thereto,) may, in favour of a *purchaser for a valuable consideration*, (and such every patentee from the Commonwealth is,) be construed as equivalent to an actual entry, into lands granted by the Commonwealth. How many thousand titles must be defeated, if, in order to transmit an inheritance in lands so granted, or to give validity to a devise thereof, or to any other conveyance, an *actual entry and corporeal seisin* must be proved in every case? It would be both a mischief, and an inconvenience, too great for the law to adopt, or to countenance.

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(a) *Vide*
Harg. Co. Litt.
29. a. note 2.

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Again; by an express provision in our law, *actual possession* need not be proved to maintain a writ of right. If the law will admit a patent, as evidence of a complete title in the demandant, or his ancestor or predecessor; in the highest and most solemn contest concerning lands, will it reject such evidence in an action merely possessory. The object of the evidence in both cases must be to prove an *hereditary right* in the original patentee, absolutely perfect, so as to be capable of conveying or transmitting the inheritance. It would seem strange if we were to reject the evidence of this patent to *John Fox*, in this case, as insufficient to support the plaintiff's title derived from his son, and devisee, and thirty years hence the same patent should be offered and admitted as evidence sufficient to maintain a writ of *right* for recovery of those lands, or others in the same predicament.

(a) *Co. Litt.*
111. a.

Nor do I conceive it necessary that *Henry Fox* should have made an actual entry upon the lands to enable him to convey to Mr. *Clay*. Wherever there is a devise of lands, the law casts the freehold upon the devisee before entry; (a) and, by the will, the possession of these lands was in Mrs. *Fox*, until she had made the appointment to her son pursuant to her husband's will; that appointment being made, the law cast the possession, both under the will and under the deed of bargain and sale, (in which form the appointment was made,) *instantly*, upon the son. His possession thus acquired enabled him to convey all the lands of which he was *not actually* disseised. An actual entry was not necessary to be made by either, to enable the plaintiff to maintain an ejectment. (b)

(b) *Co. Litt.*
240. b. *Hull.*
Ni. Pri. 103.
3 *Burr.* 1897.
Dougl. 463.

Upon the whole, I am of opinion that the plaintiff was entitled to recover all the lands comprehended within the lines of *John Fox's* patent, of which his son and devisee was *not actually* disseised, by the abatement of *William White*, at the time that *Henry Fox* executed the conveyance to the plaintiff, which the Jury have found in their verdict; and therefore that there ought to be a *venire*

facias de novo, to ascertain the boundaries of the lands not comprehended within the line of *White's* patent for 350 acres; the plaintiff being entitled to the *residue*.

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Judge ROANE. In the case of *Birch v. Alexander*,^(a) it was held that a seisin in the *Commonwealth* need not be found; *that* being the ultimate point beyond which a party in proving his title is not bound to go. Although this would *seem* to import that, in all the *derivative* stages, seisin must be found, yet undoubtedly the finding of an actual seisin, or corporeal investiture, may be *supplied* by finding other things deemed by the law of equal validity and notoriety. Thus, under the decision in *Tabb v. Baird*,^(b) it would be sufficient to find that a defendant purchased by deed of bargain and sale, (which is considered as a statutory livery of seisin,) from a person having possession. So, as a *fine* is deemed an acknowledgment of a feoffment of record, and in which livery of seisin is not necessary to be actually given, the supposition and acknowledgment thereof in a Court of *Record*, *however fictitious*, inducing equal notoriety,^(c) the finding of an assurance of *that kind* would be equally effectual, were it not obsolete in this country. In like manner it is held, that letters patent, under the great seal, amount to a livery in law.^(d) In all these cases an actual corporeal tradition is dispensed with by the law, on the ground that acts of equal notoriety with it ought to have an equal and similar effect. The reason of this holds very strongly in relation to grants of land in a new country, where the proof of actual possession would be very difficult, and where, in some sense, a corporeal investiture of the land has been already taken by the entry and survey which preceded the grant, and may be said to be admitted and sanctioned thereby. In the case before us, the seisin thus acquired by the original patentee was deduced to the present appellant by the deeds of bargain and sale stated in the verdict, as to all that part of the tract in question, of which the appellees were not in possession under

(a) 1 Wash.
59.

(b) 3 Call,
475.

(c) 2 Bl. Com.
348.

(d) 5 Co. 94.
Barwicke's
case.

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William White's patent, and he is entitled to recover that residue. But, inasmuch as the verdict is defective in not particularly locating in the plot *White's* patent, and, consequently, does not shew where that surplus lies, the verdict ought to be supplied in this particular, and therefore a *venire de novo* ought to be awarded.

Judge FLEMING. It appears by a survey and plot made under an order of the District Court of *Franklin*, that *Fox's* patent, under which the appellant claims, contains (instead of 342) 440 acres; and it is found by the verdict, that *White's* patent, containing 350 acres, is included therein; but no discrimination as to the part of the plot in which the said 350 acres lie; so as to ascertain the boundaries of *White's* patent. Therefore, for the uncertainty, I concur in opinion that the judgment be reversed, the cause remanded to the Superior County Court of *Franklin*; and that a *venire de novo* be awarded.

It is to be understood as the unanimous opinion of the Court, that a patent from the Commonwealth for waste and unappropriated lands gives to the grantee a sufficient seisin to enable him to alien, without having ever been in actual possession of the premises, by a personal entry thereon.

The following was entered as the opinion of the Court, "The Court, having maturely considered, &c. is of opinion that the special verdict is uncertain and insufficient in this; that it appears by the survey, made in this cause and referred to in the said verdict, that the boundaries of the lands claimed by the lessor of the appellant under *Fox's* patent, contain 440 acres, within which the lands designed in the grant to the appellee *White*, containing 350 acres only, are found by the Jury to lie, without discriminating the metes and bounds of the lands contained in the last-mentioned patent, whereby the boundaries of the residue

of the said 440 acres to which the lessor of the appellant is entitled may be ascertained; and that the said judgment is erroneous." The same was therefore reversed and annulled, and a *venire facias de novo* awarded.

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Atwell's Administrators against Towles.

Thursday,
April 19.

IN an action of debt on behalf of *Towles*, executor of *Lewis*, against *Thomas Atwell's* administrators, the instrument declared upon was a bond in the usual form, from a certain *Johnson Smith* to *Michael Montgomery*, in the penal sum of 179*l.* 14*s.* 4*d.* dated the 9th day of *June*, 1783, and conditioned to be discharged by the payment of 89*l.* 12*s.* 2*d.* the first day of *September* then next ensuing; with a writing underneath in the following words:

"I *Thomas Atwell*, of *Prince William*, do join in the above obligation with *Johnson Smith*, and am his security for the above sum of eighty-nine pounds seventeen shillings

1. At the foot of a bond, with a penalty and condition in the usual form, signed and sealed by *J. S.*, a writing is signed and sealed by *T. A.*, in the following words: "I *T. A.* join in the above obligation with *J. S.*, and am his security for the above sum of —," (mentioning the sum specified in the condition.)

this, it seems, is a joint obligation; and judgment may be rendered against, *T. A.* for the penalty, to be discharged by the sum in the condition, with interest.

2. An assignment of such an instrument, by the words, "I assign the within obligation," is a good assignment of the claim upon *T. A.* as well as *J. S.*

3. *Quere*, whether a declaration against the administrator of one of two joint obligors, averring that neither the defendant, nor the other obligor, nor any representative of his, had paid the debt; (without stating that such other obligor was dead, or that the defendant's intestate had survived him;) and alleging, in assigning the breach, that right of action had accrued, upon the premises, against the defendant's intestate, (without setting forth in what manner,) be good after verdict?

4. In an action of debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest: and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty.

5. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor.

6. By virtue of the 24th section of the District Court law of 1792, the copies therein allowed, are good evidence in suits brought since that act took effect; although the filing of the originals was before that time.

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and two pence; as witness my hand and seal this 21st day of June, 1783.

" Thomas Atwell. (Seal.)

" Teste Nathan Hayes,
" Richard Scott."

On this instrument, a suit was brought in the General Court against *Johnson Smith*; in the progress of which *Thomas Atwell* became his special bail, and surrendered him to the Sheriff of *Prince William*. At a General Court held *April 27th, 1786*, he confessed judgment in custody, and the Sheriff was ordered to retain him in execution. Fourteen years after this, viz. in 1800, the suit now in question was brought in the *Haymarket District Court*, by *Oliver Towles*, executor of *Thomas Towles*, who was acting executor of *Nicholas Lewis*, who was assignee of *Butler Bradburn*, assignee of *Michael Montgomery*, against *Charles Atwell*, administrator, and *Anne Atwell*, administratrix of *Thomas Atwell*, deceased.

The declaration made *profert* of a certified copy of the bond and endorsements, obtained from the files of the General Court, (the original not being in the plaintiff's power or possession,) and set forth particularly the penal part; the condition; the writing signed and sealed by *Thomas Atwell*; and the several assignments endorsed upon it; stating the same to be assignments of the two writings obligatory by endorsement on the paper containing both; by reason of which premises, and by force of the act of Assembly in that case provided, all the rights that vested in the said *Montgomery* accrued to the said *Lewis*: and the plaintiff avers that the said *Johnson Smith*, or any representative of his, or either, on his behalf, hath not paid the debt aforesaid, or either of the sums of money before mentioned, &c. but the same yet remains due and unpaid: nevertheless the said *Atwell*, against whom right of action accrued under the premises, did not pay the said debt, or either of the said sums of money, &c. but hitherto to pay the same debt hath entirely refused," &c.

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The defendant, *Charles Atwell*, pleaded "*payment by Smith and no such assignments*;" to which the plaintiff replied generally. At the trial, the plaintiff offered in evidence a copy of the record of the suit first above mentioned; and proved the execution of the writings obligatory, both by *Smith* and *Atwell*, and the execution of the assignments, which are "*of the within obligation*;" and this was all the evidence exhibited to the Jury; whereupon, the counsel for the defendant prayed the opinion of the Court "whether the writing obligatory, signed by the said *Thomas Atwell*, deceased, and set forth in said record, can properly go in evidence to the Jury; or, in other words, whether the said obligation tallies and agrees with the count in the declaration; and also, whether the writings in the record, importing to be assignments, were legal assignments, and sufficient to support the statement thereof set forth in the declaration: and the Court gave it as their opinion that the said obligation tallies and agrees with the declaration; and that the said assignments were legal and sufficient to support the statements of the assignments made in the declaration: to which opinions the counsel for the defendant tendered a bill of exceptions, which was accordingly signed and sealed. The Jury found the issues for the plaintiffs, and judgment was entered for 179*l.* 14*s.* 4*d.* "the debt in the declaration mentioned," to be discharged by the payment of 89*l.* 17*s.* 2*d.* with interest thereon at five *per cent.* from the 1st of September, 1783; and the costs; "with interest thereon at six *per cent.* from the date of this judgment (which was the 1st of November, 1804) until paid;" whereupon the defendant appealed.

Williams, for the appellant. If *Atwell* was bound at all, it was only for 89*l.* 17*s.* 2*d.* and not for the *penalty*: and, if for the *penalty*, the judgment is erroneous, because it is to be discharged by a greater sum than the *penalty* itself. This was either a *joint* obligation of *Atwell* and *Smith*, or a *collateral* undertaking. If it was a *joint* obligation, the

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suit being against *Atwell's* administrator, and no *verment* that he survived *Smith*, the Court will not *presume* the other obligor dead; and if he be living, the action survived against him. If it was a *collateral* undertaking, the declaration should have demanded the 89*l.* 17*s.* 2*d.* only, and not the *penalty*.

The record from the General Court should not have been received as evidence. It is true that, according to the modern decisions, where a bond is *lost* or *destroyed*, the plaintiff may declare on a copy: but that was not the case here. So, under the late law concerning District Courts,^(a) the copy in this case might have been received: but that act can only apply to cases arising since it was passed. Besides, *Atwell's* obligation was no part of the record in the General Court; the suit there having been brought on the bond of *Smith* alone.

(a) 1 *Rev.*
Code, p. 77.
s. 24.

Botts, for the appellee. There is really but one point in this cause; and that is whether this appears judicially to the Court to have been a *joint* bond, on which the right of action survived against *Atwell*. As the defendant did not plead that the other obligor was alive, the Court will not intend it. The declaration makes out a strong *implication* that the defendant's intestate survived *Smith*. It is certainly defective, but only states the case defectively, and does not state a defective case.^(b) But, if the declaration was bad, the defendant should have demurred, or moved in arrest of judgment. He could not, upon the trial, object to the evidence, merely on the ground of its insufficiency to maintain the action; since it agreed precisely with the declaration.^(c)

(b) *Rushon*
v. *Aspinall*,
Doug. 679.

(c) *Cuning-*
ham v. Her-
don, 2 *Call*,
580.

The obligors bind themselves as completely as language can express. The security agrees to *join* in the *above* obligation. This makes the bond *joint* to all intents and purposes. The declaration described it exactly as it was.

As to the objection arising from the circumstance that the principal and interest amount to a greater sum than

the penalty; the judgment is always for the penalty, to be discharged by the principal and interest. If that exceeds the penalty, the defendant has his choice, and may satisfy it by paying the *penalty*.

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Judge TUCKER suggested a difficulty. The body of *Smith* being in *execution*, could another judgment be obtained against *Atwell*?

Botts. The doctrine is, that taking the body is no *satisfaction*; but you may still go on against the other obligor.

On this point, *Williams* admitted the law to be as stated by *Botts*.

Thursday, April 26. The Judges delivered their opinions.

Judge TUCKER. On perusing the record in this case, I can discover no *radical* error therein. The judgment, being entered for *interest*, at six *per cent. per ann.* on the *costs* of the suit, at first I thought it was erroneous; but I find that the act of 1803,(a) gave interest upon *costs*;* and this judgment was rendered before that act was amended at the next session.(b) I have had some doubts, indeed, in what manner the plaintiff ought to have declared, upon this uncommon obligation, which I incline to think a *collateral*, and not a *joint* bond; and though, perhaps, upon a demurrer, the declaration might have been considered as faulty, yet, as no exception was then taken to it, I think the error in demanding the penalty (if it be an error) is cured by the statute of jeofails. The evidence was, I think,

(a) 2 Rev.
Code, p. 30. s.
29. s. 5.

(b) 2 Rev.
Code, c. 57. s.
2.

* Note by the Reporter. It has since been decided, on argument, in the case of *M'Rea v. Brown*, April 2d, 1811, that interest on costs could not properly be allowed, under the above-mentioned act of 1803. In this case, the point was not made in argument, and appears to have been noticed by Judge TUCKER only.

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unexceptionable, and very properly admitted. Upon the whole, I think the judgment ought to be affirmed; although a skilful pleader might perhaps have puzzled the plaintiff's counsel, and the Court, by a judicious and well-timed defence. I believe and hope the justice of the case has been obtained; and, thinking so, I am unwilling to reverse a judgment when I cannot satisfactorily point out an error.

Judge ROANE. The bond stated in the declaration, was undoubtedly the bond of *Atwell*; and *that*, as well in relation to the penal part thereof, as the condition. Stronger words could not have been used by him to testify his willingness to be bound thereby, and the writing containing the same is sealed and delivered by him. A contrary decision would go the full length, therefore, of affirming that an obligor cannot adopt, by reference, (by any words whatsoever,) a previous obligation, as his obligation, and become a party thereto; a position which is entirely interdicted by the rules of law, which regard substance, rather than the forms used, in relation to this subject. But, although this was the bond of *Atwell*, it was his *joint* bond merely. The expression is, "I agree to *join* in the above obligation, and to be the security of *J. S.*," which expression is abundantly satisfied by considering it as a *joint* bond, and there is nothing therein to import that a *several* one was intended. In the case of *Harrison v. Feild*, (a) it is said by one of the Judges, that there may be good reasons with an obligor to prefer a joint bond to a joint and several one; such, for example, as those resulting from the doctrine of survivorship. In 5 *Bac.* 164. it is said that if three bind themselves in a bond "*conjunctim, et quemlibet eorum*," it is yet only a *joint* bond, by reason of the word "*conjunctim*," and that the word "*quemlibet*" cannot make it several; it being inserted only to shew more strongly that they should *all* be bound, but not that they should be *severally* bound. This case is infinitely stronger than the case at bar, in which there are no words whatever

(c) 2 Wash.
138.

importing or seeming to import, that the bond should be *several*.

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Being a *joint* bond, therefore, and made in the year 1783, it is of the very substance and *gist* of the action, when one obligor or his representatives is sued, to aver in the declaration that that obligor survived his companion; for, if they are both alive, the action must be against both; and, if his companion survived him, the action against his representatives is gone for ever. I do not require any particular technical form of words in the declaration to charge this, but the fact must be substantially stated: it cannot be dispensed with, under the decisions of this Court, which are too numerous and too well known to the bar to be particularly mentioned. Let us see whether any thing like a positive averment is contained in the declaration before us. There is an averment "*that neither the said J. S. or any representative of his*" has paid the debt. This, at most, only charges, by implication, that *J. S.* was dead and had a representative: it does not, however, come up to the point of stating that he died *in the life-time of Atwell*. It therefore avers nothing, to give the action against *Atwell's* representatives. Again, it is stated in the breach, that the said "*Atwell, against whom right of action accrued under the premises,*" did not pay: but this again does not come up to the *desideratum*: it not only states an inference in *law*, instead of the averment of the necessary *fact*; but that inference may have arisen in the mind of the drawer of the declaration, from a misapprehension of the purport of the bond; in consequence (perhaps) of his erroneously taking it to be a *several* bond, as well as a *joint* one. It is not the province of a plaintiff to state merely the inferences of *law* in his declaration, but those *facts* also on which they are founded, and which form the foundation of his claim. This declaration then is radically defective in substance;

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and I regret to say that the judgment of the District Court must, on this ground, be reversed.*

Judge FLEMING entertained doubts whether the judgment was right or wrong; but said it was always a rule with him in such cases to *affirm* it. He therefore concurred with Judge TUCKER; and, by a *majority* of the Court, the judgment was affirmed.

* After this case was decided, Judge ROANE stated, as a circumstance shewing the importance of the requisite averment in the declaration, that in the case of *Atwell's Adm'rs v. Milton*, decided in this Court (*vide 4 H. & M. 253.*) upon a covenant in which *the same parties above named (Atwell and Smith)* were joined, it was stated, by way of *implication*, in the declaration, that *Smith* survived *Atwell*; whereas, in the present case, it is said to be implied from the statement made in *this* declaration, that *Atwell* survived *Smith*; and that he *believed*, judgment was rendered in that case accordingly!

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Dilliard against Tomlinson and others;
And Wyatt, Administrator of Curtis, against Muse
and Wife and Kemp.

THESE two causes were argued together, on the main subject of controversy; (viz. whether the decision of this Court in *Tomlinson v. Dilliard*, 3 Call, 120. should be reconsidered, and confirmed or rescinded;) though several other *distinct* points occurred in each case.

The cause of *Tomlinson v. Dilliard* having been "re-manded to the High Court of Chancery, for accounts to be taken, and further proceedings to be had therein, according to the principles of that decision," was, in conformity to the principles of that decision, "concerning the distribution of unbequeathed personal estate," was passed,) or any of her issue, by a person *other than the father*, was not entitled to any part of such infant's *personal estate* derived *immediately* from the *father*.

2. But the law was otherwise relative to the property of an infant who died intestate, between the 1st of *January*, 1787, (when the acts of 1785 took effect,) and the 1st of *October*, 1793; the distribution during that interval being regulated by the acts of 1785, c. 61. and c. 60.

3. Neither was the mother, or her issue, as above mentioned, excluded, where the property was derived, *not immediately, but by intervening succession*, from the father.

4. An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the *day* it became due; (no proof appearing that it was *then* collected, or that interest *from that day* was received upon it;) but a reasonable time, to collect and apply the money, should be allowed before the commencement of interest.

5. In such case, *no interest* ought to be charged where the *right* to the slaves was in dispute, and it was doubtful *to whom* the money, when collected, should be paid; no proof appearing that the executor or administrator received any interest, or made any profit.

6. Prior to the 1st of *May*, 1804, (when the act "concerning the proceedings in the Courts of Chancery, and for other purposes," took effect, see 3 *Rev. Code*, p. 30.) the Courts of Chancery, on debts *not bearing interest in terms*, could not grant interest subsequent to the date of the decree. See *Deane v. Scriba*, 3 Call, 415.

7. The *profits* of the estate of an infant dying intestate, (including the *increase* of slaves,) accruing to such infant in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person, or persons, inheriting such estate *generally*.

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the act of assembly, sent to the Superior Court of Chancery for the District of *Williamsburgh*; which Court thereupon decreed "that the defendant *George Dilliard* deliver to the plaintiffs all the slaves of *Benjamin Edloe Tomlinson*, the infant intestate, which came to him from *Benjamin Tomlinson* his father, and account for their profits; that he also account with the plaintiffs for the other personal estate which came to the said intestate in the same manner, and pay what shall be due thereon; which several accounts were directed to be taken by a commissioner, who reported a balance due from the defendant on the 1st of *January*, 1802, of 210*l.* 5*s.* 6*d.* consisting of 195*l.* 4*s.* 5*d.* principal, (being all (except 4*l.* 2*s.* 2*d.*) for the hire of slaves,) and 15*l.* 1*s.* 1*d.* interest; as per statement annexed, in which the interest was charged, on the sums which annually became due, *from the 1st day of July in each year.*

The defendant excepted to the report for the following reasons:

1. "That the hires of the several slaves are extended at too high a price, the said slaves being by no means worth so much;

2. "That *interest* is charged on the amount of the hire of the slaves; which ought not to be; for the hire of slaves, and the rent of lands, is always given in lieu of interest;

3. "That the defendant is not allowed a sufficient sum for maintenance of the slaves; the maintenance of which forms an *item* of credit in the said report.

The Chancellor, on the 26th of *July*, 1803, disallowed the exceptions, and, confirming the report, decreed that the defendant pay unto the plaintiffs the sum of 210*l.* 5*s.* 6*d.* with interest on 195*l.* 4*s.* 5*d.* part thereof, at the rate of 6 *per centum per annum*; from the first day of *January*, 1802, "till paid;" and their costs in the Courts of Appeals and Chancery: to which decree, on the petition of the defendant, a writ of *supersedeas* was awarded by this Court.

In the case of *Wyatt, Administrator of Curtis*, the bill (originally filed in the late High Court of Chancery, on behalf of *Charles Curtis*, of the County of *Middlesex*, and his infant daughter *Elizabeth*, against *Peter Kemp*, executor, and *Harriet Murray*, only surviving child of *William Murray*,) stated, that, about the beginning of the year 1787, the said *William Murray* died, leaving a widow, *Mrs. Anne Murray*, and three daughters, *Mary Anne*, *Harriet*, and *Fanny*; that he left a will, whereby he disposed of his lands, slaves and personal estate among his said three daughters; that the widow, in due form of law, renounced all benefit from the said will, and, some time after, married the plaintiff *Charles Curtis*, by whom she had three children, *Christopher* and *Joanna Curtis*, and the plaintiff *Elizabeth*; that, in *March 1793*, *Mary Anne Murray*, one of the daughters, died under age, unmarried, and intestate, leaving next of kin her mother and two sisters aforesaid, and her half brother and half sister *Christopher* and *Joanna*; that the said *Joanna Curtis* died in *July* following; that the plaintiff *Elizabeth* was born some time before the month of *April, 1795*, at which time the said *Fanny Murray* died, an infant, unmarried and intestate; that, in the same month, and after the death of the said *Fanny*, *Christopher Curtis* died; and that *Anne*, the wife of the plaintiff *Charles*, died in *August* following.

The plaintiffs contended that, on the death of *Mary Anne Murray*, *Charles Curtis*, in right of his wife became entitled to 1-4th of the slaves and other personal property of the said *Mary Anne*; that another one fourth vested in *Fanny Murray*; that *Harriet Murray* became also entitled to one fourth; and the remaining one fourth vested in *Christopher* and *Joanna Curtis*, in equal shares; that, on the death of *Joanna*, her share vested in her father; that, on the death of *Fanny Murray*, one third of her slaves and personal estate vested in *Charles Curtis*, in right of his wife; one third in *Harriet Murray*; and the remaining one

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third in the plaintiff *Elizabeth* and *Christopher* her brother, in equal moieties; and that, on the death of *Christopher*, his share both of the estate of *Mary Anne* and *Harriet* vested also in his father. They submitted their case to the Court, and prayed a decree according to their rights.

The defendants, by their several answers, admitted the truth of the allegations in the bill; whereupon the Chancellor decreed, that, as to the *real* estate, the bill be dismissed; but, as to the *personal*, that the defendant *Peter Kemp* do render an account of his administration before Commissioners, and deliver and pay to the plaintiff, *Charles Curtis*, one half of the slaves and other personal estate of *Mary Anne Murray*, and four equal seventh parts of the slaves and other personal estate of *Fanny Murray*; and to the plaintiff *Elizabeth Curtis*, one equal seventh part of the said slaves and other personal estate of the said *Fanny Murray*.

The decision of the Court of Appeals in the case of *Tomlinson v. Dilliard* having taken place subsequently to this decree, *Thomas Muse*, and *Harriet* his wife (formerly *Harriet Murray*) and *Peter Kemp* preferred a bill of review; being advised that the original bill ought to have been entirely dismissed, "because, according to the statute of distributions, the mother of the said *Mary Anne* and *Fanny* (who died infants and unmarried) and the children of their said mother by a second husband, were expressly excluded from any share of the property which they derived from their father;" to which bill of review the defendants demurred, and the plaintiffs joined in demurrer. The Chancellor, on argument, overruling the demurrer, reversed his former decree *in toto*, and dismissed the original bill with costs; whereupon an appeal was taken by *Charles Curtis* and *Elizabeth Curtis*; which afterwards abated by the death of the former, and was revived in the name of *Peter Wyatt*, his administrator.

George K. Taylor, Wickham and Randolph, for the ap-

pellants, contended that the opinion of this Court, formerly expressed in the case of *Tomlinson v. Dilliard*, was erroneous, and might yet be retracted; the decree of the Court of Chancery having been *interlocutory* only. The two appeals now in question, and several others, had been brought up for the express purpose of having the point reconsidered; the public mind being generally dissatisfied, and the law not considered as settled by a single decision, concerning the propriety of which so great a diversity of opinion existed.

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Hay, Nicholas, Warden and Call, for the appellees, controverted these positions; insisting that this subject, having been *decided*, ought not again to be discussed; and if discussed, ought to be decided precisely as before.

The argument on both sides was supported with great zeal and ability, during the 9th, 10th, 11th, 13th and 14th days of *March*, 1809; but a small part only can be comprehended within the limits of this work.

I. In support of the *first* point, (viz. that this Court had erred in the case of *Tomlinson v. Dilliard*.) it was said that the intention of the legislature in the 27th section of the act of distributions^(a) could not have been to adopt, as to *personal* estate, the 5th and 6th sections of the act to reduce into one the several acts directing the course of descents; those sections being *provisos*, and containing terms properly applicable to *real* estate exclusively; such as the words "*purchase or descent*," "*dower and curtesy*." An infant cannot take *personal* estate by *purchase* or *descent* from father or mother. If the clause be taken at all, it must be taken altogether. If so, there must be *dower* or *curtesy* in the *personal* estate; which would be absurd.

(a) 1 *Rev.*
Code, p. 164.

Suppose the words *donation*, *grant*, *last will and testament*, and *intestacy*, substituted in their proper places in those *provisos*, so as to make them apply to *personal* estate;

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still the effect, as to the clause relating to property derived from the *mother*, would be nugatory; since, by the marriage, all the *wife's* goods and chattels belong to the *husband*.

In the commencement of the 27th section aforesaid, the legislature was extending privileges to the widow to which she was not before entitled; yet, by this construction, the concluding part is to deprive her of the whole, in case of the death of her child.

Again; the difficulty of applying the principle of preferring the blood of the first purchaser to the case of chattels is extreme; since, in every case, it would be necessary to ascertain whether sheep, hogs, or other things of a fluctuating and transitory nature, were derived from the father or mother.

A construction big with so many difficulties, inconveniences and absurdities, ought to be avoided if possible, and the Court should be *astute* to get rid of them. This may be done either by construing the provisos in the act of descents as applying to the subject matter only; (which is lands;) or by rejecting them as to *personal estate*, on account of the absurd consequences which would otherwise result; (a) or, thirdly, by construing the two acts (which both passed at the same session) as one instrument, and transposing the sentences so as to connect them properly, and make their meaning consistent and rational.

(q) 1 Bl. 91.

With respect to authorities, *Cutchin v. Wilkinson*, 1 Call, 1. was relied upon as in conflict with *Tomlinson v. Dilliard*, and deciding substantially the same question. If the point was not argued in that case, it must have been because the members of the bar thought it too plain for argument.

To shew the power of the Courts to correct the phraseology of laws, by restraining, enlarging, or modifying general words for the purpose of meeting the intention of the legislature, *Brown v. Turberville*, 2 Call, 395. was cited as a strong case; also *Martin v. Ford*, 5 T. R. 103. Wil-

Liams v. Pritchard, 4 T. R. 2. and *Rex v. Pitt*, 3 Burr. 1338. Lord Mansfield's observations.

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The counsel on the other side observed that all these arguments relate to the *policy* of the law, or what it *ought to be*; not to the *meaning* of the law, or what it *is*. The words of the statute are certainly in favour of the construction we contend for: and *quoties in verbis nulla ambiguitas, ibi nulla constructio contra verba fienda est*. On an appeal to the common sense of mankind 999 out of 1000 would be of opinion that the legislature intended what they said.

Neither does that construction lead to the absurd consequences imagined. Why should the words *curtesy*, *dower*, &c. be interpolated as to personal property, when such words are altogether unnecessary, and would be absurd? And, as to the incongruity of extending and diminishing the rights of the widow in the same section, there is none: her rights are extended in one respect, and diminished in another, so as to put them on a reasonable footing.

The want of reciprocity in the provisions of the act proves nothing: for, in law *generally*, the rights of husband and wife are not reciprocal: yet the Courts must obey the law. Nor should the decision of the question be affected by the difficulty of *identifying* the property; since greater difficulty often occurs in cases of *executory devises* of personal estate. The tenant for life takes and uses it at pleasure; and, after his death, if he lives a hundred years, the identity must be proved.

II. As to the *second* point; that the opinion heretofore expressed did not preclude the Court from reconsidering the subject; the counsel for the appellants admitted the general rule that a *final* decision, by *any* Court of competent jurisdiction within the Commonwealth, (not appealed from or reversed,) is a *bar* as to the same point. This principle is universal; and does not apply to the Court of Appeals only. On a *scire facias* or action of debt on a judgment, the original judgment is not examinable. So,

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when this Court decides on a *final decree*, its decree is *final*: but the case is otherwise where it decides on an *interlocutory* decree: in that case, this Court stands in the place of the Chancellor, and is clothed with all his privileges. At *common law* no appeal lies from a judgment not final: but not so in *Chancery*. This Court is authorized by the act of assembly to take cognisance of interlocutory decrees, which the Chancellor can alter whenever he pleases. He has power to revise them; why not then *this Court*? Suppose a plain case of mistake; a receipt lost, and afterwards found. The Chancellor would surely have a right to alter his interlocutory decree according to the document so found. When the Court of Appeals has decided on an interlocutory decree, the cause is not *ended*, though it goes off the docket here; for either party, at pleasure, may bring it here again. Though a new appeal bond is given, the *whole record* is sent up, and the *whole case* is before the Court.

The decision, therefore, in *Tomlinson v. Dilliard*, being *interlocutory*, does not operate as a *bar* to a different decision at this time.

Neither is it a *binding precedent*. The Court, it is true, ought not to retract its decisions, except on such grave and weighty grounds as apply to this case. But those decisions ought not to be irrevocable and irreversible, however erroneous. This Court must be conscious of not being exempt from the lot of humanity; and the country would be better satisfied, if it should pursue the course of correcting its decrees when discovered to be certainly wrong. In

(a) 1 Call, 1. the cases of *Cutchin v. Wilkinson*, (a) *The Commonwealth v. Beaumarchais*, (b) *Barnet v. Darnielle*, (c) and *Murray v. Carrotte, Costars and Co.* (d) the decisions were reconsidered at subsequent terms, and not regarded as *binding precedents*.*

* Note. It does not appear from the reported cases, but from the *Order-books*, that this observation was correct.

On the other side it was urged that, according to this doctrine, the decisions of this Court would be perpetually fluctuating; and great mischiefs would arise from the uncertainty of the law. This subject has been discussed between these very parties; and *Tomlinson* is now in possession of the property under the decree of this Court. Nothing was said in the petition for the supersedeas about bringing the *merits* of the case on the main point into controversy again. The decision excited universal attention, and was generally acquiesced in. A vast deal of property must change its owners if that decision be now reversed; and, after all, a future Court might reverse the reversing decision.

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Cases may, indeed, be reargued, during the same term, or afterwards, *before* the opinion of the Court is *finally* entered. But precedents when once *established* are obligatory upon the Court. The general assembly, by the act "concerning the distribution of unbequeathed personal estate," passed *January 22, 1802*, (a) shewed that they considered the case of *Tomlinson v. Dillard* as a *binding* authority as to past cases, and not to be shaken but by a legislative act. They therefore passed a prospective law to provide for *future* cases only.

(a) 1 *Rev.*
Code, 426.

The Court should pause before it establish a principle which would detract from the solemnity of its own decisions. If the gentlemen succeed in what they contend for, the question, instead of being more at rest, will be more unsettled. There being two opposite decisions of this tribunal, who is to decide which is to prevail? Would *we* be precluded from applying for a rehearing? We should have a better right than they had; since the circumstance of two conflicting decisions would be in our favour.

That this was an *interlocutory* decree does not vary the question. It is admitted that *interlocutory* decrees *not acted upon by this Court* are always under the control of the Chancellor until his final decree. But why was an appeal allowed to this Court if not to settle the *principle*? Is not

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the decision here on an interlocutory decree equally solemn as on any other? Can the Chancellor, after an *affirmance* by the Court of Appeals of such a decree, *alter it*? No: it is obligatory on *him*, as well as on all other persons. A contrary doctrine would make this Court merely assistant to the Chancellor, and produce perpetual litigation. A bill of review for matter of *law* would lie to a decree of this Court; and, if refused by the Chancellor, an appeal might be taken, and the whole matter gone over again. This practice would be intolerably burthensome. When a decree has been affirmed, the money paid and properly charged, a reversal would have terrible effects. In this case, the Court decided the *title* to be with *Tomlinson*: yet, after all, it is attempted to take it from him; even though he may have sold the property.

So much upon *principle*: now for *authorities*. *Bampffield v. Popham*,^(a) *Lord Peterborough v. Germain*,^(b) *Le Guen v. Gouverneur*,^(c) and *Hartshorne, Rhinelander, & Co. v. Sleght*,^(d) are strong cases in our favour. The same principle, that decisions of the Supreme Court ought not to be disturbed, is recognised in *White v. Atkinson*,^(e) which was a case of an *interlocutory* decree. In *Price v. Campbell*,^(f) an error of inserting *current* money, instead of *sterling*, was overlooked by this Court, and afterwards corrected by the Chancellor: on appeal, this Court (notwithstanding *justice required* the correction of the error) said the Chancellor had no power to correct it; the decree of this Court being *final* and *obligatory as facts*. *Triplett v. Dunlop*^(g) was a case to the same effect.

(g) MS.

In *reply*, the cases cited were commented upon, and said not to support the doctrine contended for. *Bampffield v. Popham* shews that cases *may* occur in which former decisions of the Supreme Court might be changed; though that case was not such a one. *Woodman v. Willoughby*,^(a) is to the same purport. *Lord Peterborough v. Germain* does not apply. *Le Guen v. Gouverneur* would have been

(a) *Colles's*
Rep. p. 74.

(a) *Colles's*
Rep. of Parl.
Cas. p. 1.

(b) 1 *Bro.*
Parl. Cas. 281.

(c) *Johns. N.*
Y. Cas. 520.

(d) 3 *Johns.*
N. Y. Rep.
554.

(e) 2 *Call.* 376.

(f) MS.

decided by this Court as it was in *New-York*; but is only a decision upon the common point that the Chancellor had not a right to take up a question which might have been brought before a Court of common law. *Hartshorne, &c. v. Slegt* was as erroneous a decision as ever was made: and, moreover, being a *common law* case, does not apply to *this*, which is an *equity* case. *White v. Atkinson* only shews that the Chancellor cannot alter his interlocutory decree *on the same evidence*, after this Court has affirmed it. And in *Price v. Campbell* the error was acquiesced in; the counsel having failed to except to the report. The Court, therefore, refused to give relief, in obedience to the maxim "*volenti non fit injuria*."

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The following additional points were made on behalf of the appellant *Dilliard*; besides those stated in the exceptions to the Commissioner's report.

1. That the estate of the *infant* had not been divided, but that of the *father* only.


2. A number of negro children had been born in the estate; some of whose births must have been *after* the death of the father: yet these had been considered as belonging to the father, and derived to the infant from him.

3. So, also, the *profits* of the real estate accruing after the death of the father, though belonging to the infant in his own right, had been considered as part of the personal estate of the *father*.

On the other side it was said that no proof appeared of the infant's having *any* property not derived from his father; that the increase of the negroes had been properly disposed of, according to the ordinary rule of "*partus sequitur ventrem*;" and that the profits regularly went to the person entitled to the estate generally.

The counsel for *Wyatt, Adm'r of Curtis, v. Muse and Wife*, contended that, even if they were wrong on the

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main question, the Chancellor had committed an error in setting aside his first decree *in toto*; for it was clear, that, *Mary Anne Murray* having died in *March*, 1793, before the act of 1792 took effect,* (which was on the 1st of *October*, 1793,) the distribution of her estate was governed by the acts of 1785, c. 60 and c. 61.; according to which, her mother was not excluded from inheriting a share of her estate, though derived from her father; to which share, (being one-fourth part,) of course, *Charles Curtis*, in right of his wife, became entitled.

2. That *Joanna Curtis* having died in *July*, 1793, *Charles Curtis*, her father, became entitled, in his own right, to the share of *Mary Anne Murray's* estate, which had fallen to the said *Joanna*; being one-eighth part; and,

3. On the death of *Christopher Curtis*, in 1795, *Charles Curtis*, in like manner, became entitled to the said *Christopher's* share being one-eighth of the said *Mary Anne's* estate; notwithstanding the act of 1792, which was then in force, but did not apply against him; for, though the estate of *Mary Anne Murray* came from her father; and therefore the issue of her mother by a second husband were by that act excluded from inheriting; yet the inheritance had previously fallen to *Christopher Curtis*; and *Charles Curtis* claimed under him, not under *Mary Anne Murray*. In the case of *Blount v. Gee, MS.* it was settled, that an estate which did not come immediately from the father, though it might mediate, was not to be considered as restricted from going to the mother, or her relations.

Charles Curtis, therefore, upon the whole, was entitled to one half of the personal estate of *Mary Anne Murray*, deceased; and, so far, the first decree should not have been rescinded.

* See the case of *Proudfit v. Murray*, 1 *Call*, 401. and *Brown v. Turberville*, 2 *Call*, 390.

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Judge TUCKER pronounced the following, in the case of *Dilliard v. Tomlinson*. This is the very same case which was decided in this Court, *October* term, 1801, and is reported in 3 *Call*, 105. under the title of *Tomlinson v. Dilliard*. In *October*, 1803, a petition of appeal was allowed by this Court on errors suggested in carrying the decree of this Court into execution. In the statement presented by the appellant's counsel it is suggested that the appeal was prayed for and *allowed by the Court*; not only on account of the alleged errors *after* the decree of this Court was rendered, but for the purpose of inducing *this Court to reconsider the original decree*, in the *appeal*, upon which they have already decided, upon full argument, and mature consideration, as appears by the report above referred to. As I had not the honour of being a member of this Court when the petition of appeal was allowed, I must rely on the appellant's counsel for the correctness of this statement.

Whether this Court hath power, upon a *second* appeal made in the same cause, to reconsider and *reverse* its former decision upon a point solemnly debated at the bar, and with no less solemnity considered and decided by a *full Court*, is a point of great magnitude and importance to the Commonwealth. If it hath such a power, (which I strongly incline to doubt,) it ought not to be exercised but upon some very great and important occasion of *general concern* and of great magnitude to the parties. The number of appeals taken upon the same point since this petition of appeal was allowed, is evidence of the inconvenience which might ensue from the indulgence of such a practice; and the great length of time which has been consumed in the discussion during the present term, (nearly *five days*,) warns us to beware of the consequences which might ensue from a departure from that principle which regards the decision of this Court as *final* and conclusive between the parties

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(a) *Morris,
Overton and
others v. Ross,
2 H. & M.
408.*

in the same cause, upon any point which shall have received a full discussion at the bar, and the mature consideration of the Court.(a) It is unnecessary to enlarge further upon this previous question in the present case, because, after an attentive perusal and consideration of the arguments both of the bar and of the bench, in the case of *Tomlinson v. Dilliard*, I am constrained to say, "that the words of the law are too *plain* and *positive* to admit of doubt or construction;" as was said by the Court in their decree in that case. I shall therefore proceed to consider the errors alleged against the Chancellor's decree, after the decree made in this Court.

The first exception to the Commissioner's report appears to me to be without foundation. The second, that interest is charged upon the hire of the slaves, though not very important in *amount*, being only 15*l.* 1*s.* 1*d.* is so in principle. The defendant is charged with interest from the *very day* the negroes' hire became *due*; whether it were *received* by him or not. This cannot be right: for it presupposes a fact which seldom or never happens in this country; that a debt is always punctually paid the very day it falls due. But, admit it were received on the day it became due; is an administrator chargeable with money received even upon a bond or mortgage, if there be no person authorized to receive it from him? Suppose a creditor out of the state, without any known attorney or agent within it; is the administrator chargeable with interest on the money in his hands which he has no means of paying away? Suppose, also, that the distributees are infants who have no guardian assigned them; is the administrator to pay interest until they have a guardian, or come of age? Suppose, as in the present case, he knows not to whom he is by law bound to make payment; shall he be charged with interest, until the question shall be decided by this tribunal? Lord Ch. *Loughborough*, in the case of *Creuze v. Hunter*, says, "I always understood the constant course of the Court was, that debts *carrying* interest had interest computed by the

report to the time of *actual payment*; but *simple contract debts*, not carrying interest had no interest, computed by the Master." He then asks, "Does any one remember an instance of the Master's computing interest on such debts as, on his report, do not carry interest?" (a) What is the hire of a slave but a *simple contract* debt arising from the labour of the slave? If so, is it not within the rule thus emphatically recognised, as the constant course of the Court of Chancery in *England*, from which we have borrowed almost all our ideas and rules of equity? I am, therefore, of opinion, that there is error in so much of the Chancellor's decree as allows this charge of 15*l.* 1*s.* 1*d.* for *interest* on the negroes' hire; and a still further error in allowing the interest on 195*l.* 4*s.* 5*d.* the amount of the slave hire received by the administrator beyond the date of the decree; as was decided in the case of *Brewer v. Hastie*, (b) and *Deans v. Scriba*. (c)

The next question is, in what manner this 195*l.* 4*s.* 5*d.* arising in part from the hire of negroes, and, in part, perhaps, from the rents of lands, is to be distributed. In the case of *Blount and Wife v. Gee*, decided in this Court, November, 1, 1805, (d) it was determined that Mrs. Gee, the mother of *Sarah Jones*, was entitled to inherit lands from that daughter who died an infant, which she had derived from her brother *John Norfleet*, to whom the same were devised by his father, who was also the father of *Sarah Jones*. In that case, however, *John Norfleet* had attained his age of twenty-one years: but I was of opinion, and understood the rest of the Judges who sat in the cause, to concur with me in that opinion, that the mother might have inherited these lands although *John Norfleet* had not attained his age of twenty-one years; for that the descent from the father to the daughter was not *immediate*, but broken: and therefore not within the exceptions contained in the fifth and sixth sections of the law of descents. I incline to adopt the same construction with respect to rents, issues and profits, either of land or slaves, and even of

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(a) 2 Ves. jun.
165, 166.

(b) 3 Call, 24.

(c) 2 Call,
419, 420.

(d) MS.

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personal estate *generally*, where the same can be clearly ascertained and identified as such. Otherwise, they must go with the principal subject, whatever it be. Upon these grounds, I think this money should be distributed according to the fourth section of the law of descents, and not according to the fifth, as the property immediately derived from the father must, according to the act of 1792. But as this point seems already decided in this case when it was formerly before this Court; and, as there may be a difference of opinion upon it; I shall, on the present occasion, press it no further, but submit to the opinion of a majority of the Court.

Upon the whole, I conceive the Chancellor's decree ought to be affirmed, except as to the charge of interest on the hire of the negroes as before mentioned.

Judge ROANE delivered the following opinion as applicable to the two cases of *Dilliard v. Tomlinson*, and *Curtis v. Muse*.

The general question occurring in both these cases is, whether the exceptions contained in the 5th and 6th clauses of the act of descents, in relation to infant intestates, extend to *personal* estate as well as real. In the case of *Dilliard v. Tomlinson*, a further question conditionally presents itself; namely, whether, in the event that the act *does not*, in the opinion of the Court, extend to personal estate, the Court has power to correct the decree formerly rendered in *that* case, as well as to render decrees, in other cases, pursuant to such construction of the act. This question becomes unnecessary to be decided, (as I understand,) in consequence of the opinion of the majority of the Court upon the principal question; and therefore I shall not enter upon it: the rather, because the question may rarely, if ever, be expected to occur in future.

In giving my opinion upon the general *question* aforesaid, I shall consider it as if it were an entirely new question; as if it had never before been acted upon or discussed by

this Court. In doing so, I am warranted by the *decision* of this Court at a former term; by which it was *resolved*, that that question should be *reconsidered*, and an argument upon it was directed by the Court, and has been accordingly had, *at great length*. In coming to this decision in favour of a reconsideration, the Court was justified by innumerable precedents in this Court; in which the Court has admitted its own fallibility, and corrected its former errors. I will mention, in particular, the cases of *Bedinger v. The Commonwealth*,^(a) in which this Court disclaimed a jurisdiction which it had exercised in many former instances, two of which had also gotten into print,* (a circumstance which, with upright Judges, certainly can make no difference,) and in which the Judges had also delivered *seriatim* opinions. Great as my respect is for this Court, I do not believe that it cannot err: nor can I believe that its decisions, if recent and erroneous, ought not to be corrected. I have the authority of Judge PENDLETON, in the case of *Jolliffe v. Hite*,^(b) for saying that they ought. Considering that the former judgment of this Court, in favour of a new argument of the question, is as obligatory upon us as the prior decision itself, which is the object of reconsideration; and that it has always been understood by the *bar*, and the parties concerned, that that question was to be reconsidered by the Court; I cannot but express my *surprise*, that the Judge who has gone before me, *seems* to have *shrunk* from the discussion thereof, and *reposed* himself upon the *sanctity* of the former decision. I will go farther, and say, that such reconsideration is not only proper, on general principles, in relation to the decisions of all fallible tribunals, but is peculiarly so, in relation to the particular decision now before us. That decision was a *single* and a *recent* decision: the appeal which seems to have been *tendered* to the Legislature upon it, by Judge PENDLETON, (3

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(a) 3 Call,
461.

(b) 1 Call,
328.

* *Vide Newell v. The Commonwealth*, 2 Wash. 58. and *Jones v. The Commonwealth*, 1 Call, 555.

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Call, 119.) had been immediately acted upon by that body, and the decision of the Court was *reversed*, (if I may so express myself,) by a declaratory act of the Legislature: and a *rehearing* of the question had shortly thereafter been granted *by this Court*. Under these circumstances, (to say nothing of the *probable* state of the opinion of the *bar*, and the *public*,) the decision had not been considered by our citizens as final and irrevocable, nor had ripened into a rule of property. Few or none of the consequences, therefore, resulting from overturning the settled rules of property, can be expected to arise, in any event, in this case.

In giving my opinion at present, I beg leave to have reference to, and to adopt, as part of this opinion, the one I formerly gave in this case. (3 *Call*, 109.) That opinion contains an imperfect, irregular, and *rapid* view of my ideas of the question, at that time: I shall now subjoin a few further observations upon it; but cannot omit declaring, that the ideas I submitted on that occasion, have, on long and mature deliberation and reflection, been *rivettted* upon my judgment, which, consequently, remains entirely unchanged.

I begin by saying, that the position that a preceding law or statute is to be considered as unchanged by a new statute, until such change be clearly shewn to be operated thereby, emphatically exists in relation to a Legislature of *revision*. The Legislature of 1792 was a Legislature of revision, in relation to the *general* laws, although its powers to alter them is at the same time readily admitted. The committee appointed to report upon the laws, by the act of 1790, c. 20. were *confined*, by the terms thereof, to reducing multifarious acts into single acts; or, in other words, to the province of *simplifying* the laws, and not suggesting *changes* in them. Such was also the decision of the Legislature of 1791, (a) in its resolution in answer to a letter, upon this subject, addressed to, them by the revisors. When to these considerations we add, that the Legislature both *before* and *after* the enacting the act of 1792, viz.

(a) See acts of that session, p. 37.

when they enacted the act of 1790, c. 13. and that of *January 22, 1802*,^(a) were steady in confining the exceptions in question to *real* estate only, it will require very strong features indeed, in the intermediate act of 1792, to extend them to personal estate also. I will here remark that Judge PENDLETON, in delivering his opinion formerly in this case, (3 *Call*, 119.) laid great stress upon the coincidence of sentiment in the Legislature, it having, both in 1785 and 1792, (*as he supposed*,) declared, that land and *personals* should go the *same* way. While I must be permitted to say, that in relation to the construction of the act of 1792, *that* was taking for granted the very thing to be proved, I must beg leave to borrow and apply this strong argument of that great Judge, in relation to the acts of 1790 and 1802, both of which are clear beyond the possibility of a doubt, against the extension of the principle to *personals*; and the act of 1802 is a *declaratory* act in the very teeth of the former decision of this Court.

I take it to be an undoubted rule in the construction of statutes, that *general words* in a clause thereof may be *restrained* by particular words in another clause, subsequent thereto.^(b) Applying this rule to the case before us, if, instead of the general reference in the act of distributions, for *persons and proportions*, to the act of descents, an insertion had been made in the first clause of the act of descents, extending it to *personal* as well as real estate, and to read thus: "That henceforth when any person having title to any real estate of inheritance (*or personal estate*) shall die, &c.; and if these words, "or personal estate" had been (as they are) omitted in the 5th and 6th sections, such omission, singly taken, would operate a restraint upon the general words, and narrow the operation of the said sections to *real* estate only: and *à fortiori*, when the terms "derived by *purchase* or *descent*," and the provisions relative to "*curtesy* and *dower*," (expressions and provisions which properly appertain to real estate, and not to *personal*,) are found therein, and still more so as the 6th

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(a) 1 *Rev.*
Code, p. 426.

(b) 6 *Bac.*
381. and Judge
Pendleton, 2
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section (as will be shewn hereafter) would be, as to *personal* estate, a mere nullity, on account of the incompetency of an infant to derive personal property from his mother, it being intercepted by the superior claim of her husband.

So, on the other hand, if, instead of such reference, or such insertion, a *particular* law of distribution of personal estate had been enacted, precisely similar to that of descents, merely *substituting* the terms "personal property" in lieu of "real estate of inheritance," and the 5th and 6th sections were still found therein precisely as they now exist; it *might be* reasonable to conclude, from the foregoing considerations, that they slipped into the act by mistake, related to a subject different from that of the act, belonged properly to another law, and did not apply to the case of *personal* estate at all. *That*, however, is a broader position than is necessary to be taken in this case; in which, considering the insertion to have been made as aforesaid, on the principle "*referendi singula singulis*," and of reading the act *distributively*, in relation to the different subjects thereof, the 5th and 6th sections would naturally fall within the class of the real, and be rejected in regard to the personal estate.

The general reference in the distribution act to the descent act, for *persons and proportions*, certainly cannot operate any greater effect in applying the exceptions to *personal* estate, than if the canons of descent had been particularly repeated with respect to personal property, either in a *joint* or *several* act as aforesaid; in either of which cases (it has been endeavoured to be shewn) the 5th and 6th sections would be taken in a sense restricted to real estate. This mode of a *general reference* was adopted in the act of distributions for brevity only; and a specific insertion as to personal estate was only not made in the act of descents, because that act properly related to *real* and not *personal* estate, and the reference was properly made in the *distribution* act, because that act on the other hand properly related to *personal* estate. These were the only grounds and motives

of the present arrangement, and therefore no greater effect will be produced than if a more particular and detailed adoption of the canons of descent had been resorted to, in relation to personal property.

I presume it is not necessary to quote authorities to shew, that a statute compounded of or relating to several subjects, may be read distributively in relation to each: nay, we are even told that the *same words* in a statute will bear different interpretations; and that these words may be considered as *remedial*, or *penal*, for example, (as the case may be,) according to the nature of the suit or prosecution founded thereon.^(a) So, again, taking the construction of a statute by analogy to that of a will, which, when we are in quest of *intention*, must stand on a *common* foundation with it, (with this additional circumstance concerning the former, that the Legislature are supposed to know the meaning of the technical words they use, (whereas testators are considered in the law as *inopes consilii*,) and are, therefore, rather than a testator, to be bound by them,) we are told in the case of *Forth v. Chapman*^(b) recognised in this Court in the case of *Hill v. Burrow*,^(c) that if a will devises *real and personal* estate to *A.*; and, if he die *leaving no issue* of his body, *then to B.*; that the devise shall be expounded to mean an indefinite failure of issue as to the *real* estate, and be restricted to issue living at the death as to the *personal*; shall be taken in a *legal* sense in relation to the former, and a *vulgar* sense in relation to the latter; and that the *same words* shall be taken in different senses as to the different estates, and the will be read *as if it had been repeated by two several clauses*. If this principle be extended to the case before us, and the compounded act in question be twice read, in relation to each subject, the 5th and 6th clauses will be considered as nullities when the act is read merely with respect to *personal* estate.

If the act in question be not read distributively as to each subject, (the real and personal estate,) the term "*infant*" would be taken in *one* sense only, and infancy would be


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(a) 1 Bl. Com.
88. Christian's
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(b) 1 P. Wms.
663.
(c) 3 Call,
351.

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construed to continue up to 21 as to personal as well as real estate, on the ground that *personal* estate, which is the *accessory*, should follow *real*, which is the *principal*: the consequence of this would be, that, in relation to all the life of an infant between 18 and 21, the ground of the provision of the law in this instance would wholly fail, that provision being bottomed only upon the incompetency of an infant to dispose of his estate: but that incompetency does not exist as to personal estate, after the age of 18 years. It follows irresistibly, therefore, under pain of this and similar consequences and inconveniences, that the act is to be read distributively in reference to the several subjects thereof; and that, in this particular instance, infancy is to be understood, as to real estate, to continue up to the age of 21 years, and to expire as to personal at 18.

Another rule is, that a construction which tends to absurdities is not to be admitted. (a) The extension to *personal property*, of the exception in question, leads the Legislature into the absurdity of supposing (contrary to another principle that the Legislature is not to be supposed ignorant of the proper meaning of technical terms or phrases, or of the general provisions of the common and statute law) that personal property is to be acquired by "*purchase*," or "*descent*;" that a husband succeeds to personal estate as tenant by the "*curtesy*," and a wife as tenant "*in dower*," and that an infant can derive personal estate "*from his mother*," in derogation of the superior right of her husband thereto, as established both by the general provisions of the common law, and the recognition of that *principle* in the act of distributions. (c) We are not at liberty to garble the 5th and 6th sections, by throwing out the 6th as being wholly insignificant as applied to personal property, and by rejecting the provisions relating to "*curtesy*" and "*dower*," contained in both, as being only applicable to lands: we must take the said sections altogether; and, when so taken, they completely and effectually exclude the idea of an extension of the principle to personal property. We have as much

(a) 1 Bl. Com. 91.

(a) 1 Rev. Code, 164. s. 27.

power to reject, on this ground, the whole of those two sections, as to reject the 6th section only, together with so much of the 5th and 6th sections as speaks in relation to "*curtesy*" and "*dower*:" we can as well reject the proviso itself, as reject the proviso of that proviso. We must not convict the Legislature of the *absurdities* just mentioned: we must rather say that the exceptions in question were intended to apply to "real estates of inheritance" only, as the *letter* of the proviso imports, and to which it is properly adapted in every point of view. We must permit the *particular* words in the clauses in question, having that effect *ex vi terminorum*, to restrain the general words of reference, which would otherwise lead to such absurdities.

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Again, a statute is to be so construed, that no clause, sentence or word shall be void, *superfluous*, or insignificant.(a) In the case before us, the whole 6th section will be void, superfluous and insignificant, if applied to personal estate, unless we repeal the provisions of the common law, which prevent a child's deriving personal property from his mother, by giving it to her husband on the marriage: but, on the contrary, the right of the *husband* thereto, is recognised and admitted, as aforesaid, in the *same* clause of the act of distributions, in which the general reference in question is made. It is of no avail to say, that a child *may*, in *some cases*, derive personal estate from his mother also as where she has, *after* the death of the husband, acquired such, and has not again married: *that*, although a *possible*, may be considered as a *rare* case; and statutes are to be expounded in relation to cases "*quæ frequentius accidunt*."(b)

(a) 3 Bac.
380. and Judge
Pendleton, in
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berville, 2 Call;
405.

It is further held that no statute is to be so construed as to be *inconvenient*; and that *consequences* may be resorted to where the *meaning* of a statute is doubtful; which it may be, although the *words* of any particular clause (separately taken) are clear.(c) The consequences which should influence us in this case, are not only the difficulties and absurdities before stated, but others which grow out of

(b) 3 Bac.
388.

(c) 6 Bac.
391.

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the nature of the subject, (personal property,) to be hereafter more particularly noticed. One of these consequences, more particularly, is, that the rejection of the 6th section, as aforesaid, would not only contravene justice, and the general policy of the act, but *unequally* contravene (owing to the paramount laws on that subject) the clear *intention* of the Legislature, in the exceptions in question, which was, that property coming from the *mother* should go to *her* relations, as well as the converse: but the construction I am now combating would operate differently, and give all personal property whatsoever, *however derived* to the infant, to the relations *on the part of the father!*

In the case of *Brown v. Turberville* such consequences were adjudged sufficient to control the *express letter* of the statute; and words were *supplied*, or interpolated therein, rather than overthrow and derange the general scope and policy of the act. The construction was made in that case, as I think it ought to be in this, under the influence of that rule of construction which admits a statute to be construed by equity, *contrary to the letter*, (which *equity* here stands for the *intention of the legislator*,) and considers that a thing (whatever the *letter* of the statute may be) is not within the statute, if it be not within the *meaning* thereof.

(a) 6 Bac.
302. Doug. 30.

Another rule of construction, of most overruling influence in the present case, is, that all statutes *in pari materia* are to be taken together as one system, and, in a case of doubt, to be construed *consistently*. (a) Thus, in the MS. case of *Rex v. Loxdale*, referred to in the above cited passage of *Bacon*, it was held that, "as the statute of 39 *Eliz.* was undoubtedly under the consideration of the Legislature, when that of 43 *Eliz.* was made, it ought, *although long since expired*, to be taken into consideration in construing the latter statute, for that it is a rule, that all statutes which relate to the same subject, notwithstanding some of them are expired, or not referred to, must be taken as one system, and construed consistently." Again, the *English* statute of 22 and 23 *Car. II.* having enacted that every

person shall be excluded from killing game, "not having an estate of inheritance of the clear yearly value of 100*l.* or for life, or having a lease or leases for 99 years, of the clear yearly value of 150*l.*" and a doubt having arisen whether the words "*or for life*" should be referred to the 100*l.* or the 150*l.*, the Court of K. B. having looked into the former qualification acts, and found that the qualification was an estate of inheritance of 10*l. per annum*, and an estate for life of 30*l.* a year, they *presumed* that it was *still* the intention of the Legislature to make the yearly value of an estate for life greater than that of one in *fee*, although the *same proportions* were not preserved in the act in question; and decided accordingly.(a) When to these authorities we add the foregoing considerations relative to the character of the Legislature of 1792, as a Legislature of *revisal quoad* the *public laws* of the Commonwealth, and which as such undoubtedly had *all* the laws on the subject under their consideration, and that the Legislature, both before and since the act of 1792, as aforesaid, have excluded the sections in question from an application to *personal* estate, (to say nothing of the other considerations before mentioned,) it follows, *emphatically*, that the original act of 1790, is also to be considered in forming a construction in this instance: and, if so, it is completely decisive in favour of my idea; for it not only is confined, *expressly*, to "real estates of inheritance only," but the Legislature having in one section of the same act (sec. 2.) also had reference to and amended the act of distributions, and not having extended the provision in question to personal estate, in terms, it follows that that act (which indeed has never been denied) is exclusively confined to real estate.

On this point, so decisive of the question before us, of the competency of the Court to look into the act of 1790, in forming a construction upon that of 1792, I find a strong corroborative opinion of Judge TUCKER himself, as stated in his edition of *Blackstone*, vol. 2. *Appendix*, p. 24. Speaking of the decision of this Court, in the case of *Brown v.*

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(a) *Lewndes v. Lewis*, stated by *Christian* in a note to 1 *Bl. Com.* 60.

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Turberville, he says that, "although" (as I understand him) "that decision could not be justified if the act of 1792 had been *an entire new law*; yet being, in its present form, altogether a piece of *patch work*, the same construction cannot be made upon it as if it had been made originally what it now is." If that act be a piece of *patch work*, the act of 1790, c. 13. must necessarily be a part thereof: for we are told by Judge PENDLETON, in delivering his opinion in the case of *Brown v. Turberville*, (as the fact undoubtedly is,) that the act of descents of 1792 was compounded *only* of the act of 1785 and that of 1790, c. 13. This act of 1792, therefore, not being "an entire new act," but compounded as aforesaid, we are justified in looking into both the parts of which it is compounded, as well by the opinion of the author just cited, as by the general authorities I have mentioned: and if we look into the act of 1790, c. 13. we cannot possibly wink so hard as not to see that personal estate stands utterly excluded thereby.

It is another fundamental rule in the construction of statutes, that it is the business of Judges to know the mischief which the statute was meant to remedy, and "so to construe the act as to *suppress* the mischief, and advance the remedy:" (a) a construction which leaves the mischief in full force and unredressed, and, *à fortiori*, one which enlarges or *creates* that mischief, is utterly inadmissible. We are told by Judge PENDLETON, in the said case of *Brown v. Turberville*, that the mischief of the common law in relation to land, which was meant to be put an end to by the act of 1795, was "the inquiry when a man died intestate, perhaps at fourscore, how he came by his land;" and that this was done away by that act, and only *restored* by the act of 1790, in relation to land, during the short term of the infancy of a minor: that mischief is not permitted to exist, even in relation to land, for a longer term than that. Now, when we consider that land is permanent, and passes only by deed or will, and that acquisitions thereof can, therefore, be easily traced even for the term of fourscore years, whereas

(a) 1 Bl. Com.
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personal property, being perishable and transitory, and passing also by mere delivery, (which circumstance also would give rise to much perjury and false swearing,) cannot readily nor easily be traced even for 18 or 21 years, shall I go too far to affirm, that the mischief of the common law (admitting it had ever applied to personals) is permitted, by this *uniform* construction, to exist in a *greater* degree with respect to chattels than to lands? or, in other words, that the lapse of 18 or 21 years is entirely as fruitful of mischief and difficulties, as to personal estate, as the lapse of fourscore years would be in relation to lands? It cannot be denied that the term of 21 years, is, in effect, a *longer* term in relation to tracing the genealogy of a *sow and pigs!* for example, than a century is relatively to a tract of land, under all the care the law has taken to place *on record* memorials of *all* conveyances of land whatsoever. The extension, therefore, of the limited term in question to the case of chattels, is entirely *illusory* and *unequal*: it undoubtedly opens a door to *more* mischiefs when applied to personal estate than when applied to lands, and is, in effect, a *longer* term when applied to the former than the latter; a consequence unavoidably resulting from the different natures of the subjects. Under pretence, therefore, of permitting the continuance or restoration, *in part*, of a mischief which *never did exist* in relation to chattels, we must take care not to *create* that mischief *de novo*, in its *full extent*, on the other hand, by implication, and under the delusive belief that it is merely *coequal* under a term of time, which, though *nominally* equal, is unavoidably rendered otherwise (to the disadvantage of *chattels*) by the discordant nature of the subject. I will here add, that, inasmuch as this principle of the blood of the first purchaser is to be applied to chattels, *for the first time*, in our code, it would require a much clearer legislative declaration to have that effect, than under a contrary state of things, than in the case of lands, on the other hand: it is much more natural and easy to suppose that the Legislature meant to

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restore in part, a system immemorially existing in our country till of late, as relative to land, (to which subject also it is not in so great a degree unadapted,) than that they meant to *create* in its full extent a *new* principle, never before found in our code, as applicable to chattels, and which stands interdicted, as to them, by the actual difficulties of the case, and by *irremediable* circumstances, growing out of the nature of the subject.

In making the construction in the present case, it must never be forgotten; that it is a fundamental rule, that all statutes are to be expounded with reference to the nature of the *subject matter* thereof; which (whatever may be the *words* of a particular clause of an act) is supposed to have been always in the contemplation of the legislator, and all his expressions are to be directed and controlled thereby. (a) Thus, (to omit the common-place examples upon this point,) although the *general* words of our act of distributions refer the distribution of personal property to the rules contained in the act concerning descents, which requires land to be *divided specifically, ad infinitum*, I presume it would not have required legislative aid to have authorized a Court to depart from the *letter* thereof, and decree a division by means of the *sale* of a slave, who (individually taken) is not so partible: the nature of the subject in this case would prevent the division of the slave into two parts, and control the effect of the general words of the statute. And, again, if a question were to arise under doubtful or general words of an act adopting the principle of the blood of the first purchaser relatively to chattels *through all time*, (and I see little or no difference (as I have already said) between that case and such adoption for the long term of 21 years as aforesaid,) the difficulty of ascertaining the quarter whence they were derived, amounting, in *many*, if not *most* cases, to an *impossibility*, and growing out of the nature of the subject matter, would undoubtedly turn the scale against the application of the principle, to property of that kind. THAT,

(a) 1 Bl. Com.
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in truth, is the question now before us: it differs from the case at bar only in *degree*, not in principle.

But we are told that these *tyrannical* and *cabalistical* words "same persons and proportions" are so imperious as to admit of no exception, and that the two species of property are to go to the *same persons*, and in the *same proportions*, in all possible cases whatsoever. This, *it must be admitted*, is not universally true: it is not true in the case of an *alien*, who is permitted to succeed to *personal* estate, and is prohibited from inheriting *real*. If there be an alien in the way, therefore, the two subjects do not go to the *same persons*; nor do they go in the *same proportions*; for, the alien being set aside in relation to lands, the remaining parceners will get a *greater* proportion of the land thereby: they will, in such case, get a *greater* proportion of the lands than of the personal estate of the infant, notwithstanding the reference in question. While we yield up this favourite idea of *uniformity*, in obedience to the provisions of the ordinary laws of alienage, why shall we not also succumb to those overruling and paramount considerations, growing out of the nature of the subject, which, in point of fact, and under the actual operation of the rule, set such uniformity at defiance?

My conclusion then is, that the act of descents merely gives the *general* rule for the distribution of personal property by reference to the act of descents: but that, taken as well in relation to other laws or statutes, as to *considerations* which are equal to such laws or statutes, it is only "*lex sub graviore lege*." I will not bottom myself upon the *mere letter* of the statute, (and that, too, couched only under *general* words of reference,) and obstinately contend for a construction which is reprobated by the actual nature of the subject, confronted by so many absurdities, contradictions, inconveniences and incongruities; and the consequences of which will operate undoubtedly against the manifest *intention* of the Legislature.

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Upon the whole, I am of opinion that the law is for the appellants in both the cases, (of *Dilliard v. Tomlinson* and *Curtis v. Muse*.) and that the decrees therein ought to be reversed. As, however, the other Judges are of a different opinion, I shall be ready to pass my opinion upon any *subordinate* points of a decree to be rendered, pursuant to that of the majority of the Court.

Judge FLEMING delivered the following opinion in the case of *Dilliard v. Tomlinson*. Three points were made by the appellant's counsel.

1st. Whether the former decision in this case be a *bar* to a rehearing of the merits of the cause, respecting the rights of the parties? If not,

2dly. Whether the merits be not in favour of the appellant? And, if not,

3dly. Whether there is not error in the report of Master Commissioner *Rose*, respecting the profits of the negroes in question; and whether there is not error in the decree, affirming that report; and in decreeing interest on 195*l.* 4*s.* 5*d.* from the first day of *January*, 1802, until payment shall be made?

The *first* was a point that I did not expect would have been made; though much was said in support of it; but the only plausible argument used was, that the decree of this Court, reversing that of the Chancellor, was an *interlocutory* decree, and therefore open to future discussion. That decree was made by a full Court, consisting of five members, after able and solemn arguments of counsel, and long deliberation of the Judges; and the rights of the parties respecting the subject in controversy *clearly* and *finally* decided by a majority of four to one: and what has been called an *interlocutory* decree, was a consequential and necessary order, growing out of the nature of the case, for carrying into effect the *decree* that had so expressly, and conclusively, determined the rights of the parties. And should this Court, the *dernier resort* in all our judicial proceedings,

consisting now of only three members, (but of whatever number it may consist, it makes no difference as to principle.) furnish a *precedent* to reverse its own judgments or decrees, after a lapse of eight or nine years, the evil consequences would be incalculable. That great and many mischiefs would consequently ensue, must, I conceive, be so obvious to every reflecting mind, that it seems unnecessary further to animadvert on the subject.

2. With regard to the second point, "whether the *merits* be not in favour of the appellant?" the decision of the first seems to preclude the necessity of any remarks upon it; but out of respect to the ingenious arguments of the counsel who stated it, and for my own satisfaction, I reconsidered the subject with great attention; but the more I reflected on it, the more was I convinced of the correctness of the former decision of this Court. I am not, generally tenacious of my own opinions; but all the law-learning and eloquence of *Westminster-Hall* could not convince me that the decision (*as the law then stood*) was erroneous. The words of the law were, in my conception, too clear and explicit to admit of a doubtful meaning.

3. With respect to the third point, whether there was not error in the report of Master Commissioner *Rose*, respecting the profits of the negroes in question, and whether there is not error in the decree affirming that report; and decreeing interest on 195*l.* 4*s.* 5*d.* from the first day of *January*, 1802, until payment shall be made?

I discover no error in so much of the report as states the profits of the negroes in question to be 195*l.* 4*s.* 5*d.* and is affirmed by the decree; but there appears to be error in so much thereof as allows 15*l.* 1*s.* 1*d.* interest on those profits; and there is error in directing it to be continued beyond the date of the decree, which was not, at the time of making the decree, authorized by law, the act allowing Chancery Courts to award interest on final decrees, not having passed until the 20th of *January* following: but, as to the profits themselves, I have no doubt but that the ap-

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pellees have a right to them, in exclusion of the mother, and any relations on the *part* of the mother; not only because this Court hath so adjudged it, but also, because it seems clear to me that the right to profits follows the right to the subject out of which they issue, as the shadow follows the substance.

I am therefore of opinion that the decree ought to be reversed, so far as it respects the interest, and affirmed as to the residue.

The following was entered as the decree of this Court.

“ The Court is of opinion that there is error in so much of the said decree as directs the payment of the sum of 15*l.* 1*s.* 1*d.* by the appellant, as administrator of *Benjamin Edloe Tomlinson*, deceased, for interest on the hire of slaves, for which he is supposed to have been chargeable from the day the money for their hire became due from the persons to whom the slaves were hired, although there be no proof that the same was *then* received by the said administrator, and it was in this case doubtful to whom the same ought to be paid; and, also, in this, that the interest upon the same was directed to be continued beyond the date of the decree, which was not then authorized by law. Therefore, it is decreed and ordered, that the said decree be reversed and annulled; and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this Court, proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, it is further decreed and ordered, that the *appellant* pay unto the *appellees* the sum of 195*l.* 4*s.* 5*d.* and their costs by them expended, as well in the prosecution of their appeal formerly in this Court, as in the prosecution of their suit in the said Superior Court of Chancery.”

The following opinion was pronounced in the case of *Wyatt, Adm'r of Curtis, v. Muse and Wife*, by

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Judge TUCKER. This cause depending in great measure upon the same principles as that of *Dilliard v. Tomlinson*, I find it necessary to say no more upon the subject, generally. The limitations in the will of *William Murray*, the father of the infants *Mary Anne* and *Fanny Murray*, deceased, and of the complainant *Harriet Muse*, leave no question to be decided as to the operation of the law of descents upon that portion of his estate.

But I am of opinion, that the slaves and personal estate of those infants respectively are to be distributed among their next of kin, according to the course of law at the time of their respective deaths; that is to say, that the slaves and personal estate of *Mary Anne Murray* ought to be distributed between her mother and surviving sisters, in the manner prescribed by the act, passed in the year 1785, entitled an act directing the course of descents, which act, as to personal estate, was in full force at the time of her decease. And that the slaves and personal estate of *Fanny Murray*, which were derived to her immediately from her father *William Murray*, upon her death became liable to distribution according to the course in which lands are to descend, under the act passed in the year 1792, entitled an act to reduce into one the several acts directing the course of descents; subject to the proviso which is contained in the fifth section of that law. But that the slaves and personal estate of that infant, which were not immediately derived from her father, including under that description the *rents, issues, and profits of lands, the hire and increase of slaves, and the interest of money, or any other property acquired after the death of the father, (including also in that description the sum of 100l. charged upon the lands devised to the complainant Harriet Muse, on the contingency in the father's will expressed,)* where the same can be clearly and definitively ascertained, ought to be distributed among the next of kin of that infant, in

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the same manner, and in the same proportions, as if she had attained her full age of 21 years at the time of her decease. I am further of opinion, that if it shall appear that the complainant *Harriet Muse*, or her husband, entered upon the lands devised to her upon the contingency of the death of her sister *Mary Anne*, on her paying to her sister *Fanny Murray*, one hundred pounds current money, that complainant, or her husband, ought to be charged with interest upon that sum from the time of such entry, and possession taken and held, or upon so much thereof as ought to be paid to the distributees of the said *Fanny Murray*, other than the said *Harriet Muse*. And that this cause be sent back to the Court of Chancery with directions that an account (if required by either party) be taken, and distribution made according to these principles.

I wish it to be understood that *Charles Curtis*, the husband of *Anne Murray*, mother of *Mary Anne* and *Fanny Murray*, and also the father of *Joanna Curtis* and *Christopher Curtis*, deceased, is entitled to the distributive shares of all those persons.

Judge FLEMING. Upon the death of *William Murray*, his widow, *Anne Murray*, having renounced the will of her deceased husband, took, as her dower, three ninths of his slaves, and other personal estate; and his three daughters, *Mary Anne*, *Harriet*, and *Fanny Murray*, each two ninths thereof. Upon the death of *Mary Anne Murray*, in March, 1793, before the act of December, 1792, c. 92. was in force, her mother, then the wife of *Charles Curtis*, the appellant, succeeded to two equal eighth parts of her slaves, and other personal estate: two other equal eighth parts vested in each of her surviving sisters, *Harriet* and *Fanny Murray*; and one equal eighth part vested in each of her brother and sister of the half-blood, to wit, *Christopher* and *Joanna Curtis*. And of the reversionary interest in the dower slaves of her mother, two equal sixth parts vested in each of her said sisters, and one equal sixth part in each of her said brother and sister of the half-blood.

Upon the death of *Joanna Curtis*, in *July*, 1793, the estate derived to her from *Mary Anne Murray*, her sister of the half blood, vested in her father *Charles Curtis*, the appellant, who, upon the death of his son *Christopher Curtis*, in *April*, 1795, became entitled to one other eighth part of the estate of the said *Mary Anne Murray*, deceased, making, in the whole, a moiety thereof.

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With respect to the estate of *Fanny Murray*, she having died whilst the act of 1792, c. 92. was in full force, her mother, and brother and sister of the half blood, were thereby excluded from any distributive share of her estate.

The following decree was thereupon entered.

“ The Court is of opinion that there is error in the said decree in reversing so much of the decree in the original suit brought by *Charles Curtis*, and *Elizabeth Curtis*, an infant, by the said *Charles*, her father and next friend, against *Peter Kemp*, executor of *William Murray*, and *Harriet Murray*, only surviving child of the said *William Murray*, as declares that, by the statute for distributing personal estate, including slaves unbequeathed, the plaintiff, *Charles Curtis*, (in right of his wife and his two elder children by her, who are dead, and whom he representeth,) is entitled to one half of the personal estate of *Mary Anne Murray*; and as directs that the said *Peter Kemp*, defendant in that suit, should render an account of his administration of the estate of his said testator, before _____, Commissioners appointed to examine, state and report on the same; and as decrees that the said *Peter* should pay and deliver to the plaintiff in that suit, *Charles Curtis*, one half of the slaves and other personal estate of the said *Mary Anne Murray*; and as approves and confirms the report of the Commissioners made in pursuance of that decree and order: and that there is also error in so much of the first mentioned decree on the bill of review as dismisses the bill in the original suit with costs; this Court being of opi-

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nion that so much of the said original decree as relates to the estate of *Mary Anne Murray*, deceased, is correct, and ought to have been affirmed on the said bill of review; and that the residue of the said decree in the original suit was properly reversed; it is therefore decreed and ordered, that the decree in this suit be reversed and annulled, and that the appellants recover against the appellees their costs by them expended in the prosecution of their appeal aforesaid here. And this Court proceeding to make such decree as the said Superior Court of Chancery ought to have rendered on the bill of review aforesaid, it is further decreed and ordered, that the said *Peter Kemp* do pay and deliver to the appellant, *Peter Wyatt*, administrator of *Charles Curtis*, one half of the slaves and personal estate which were of the estate of the said *Mary Anne Murray*, deceased, and account for the profits of the said slaves from the time of her death, and pay the same to the said *Peter Wyatt*, administrator of the said *Charles Curtis*. And it is ordered, that the cause be remanded to the said Superior Court of Chancery for an account to be taken, and further proceedings to be had therein, agreeably to the principles of this decree."

Argued Tuesday, May 3, 1796, and re-argued Wednesday, October 25, 1809.

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IN an action of ejectment, on behalf of *David Hunter* against *Denny Fairfax*, in the *Winchester* District Court, the 10th of *December*, 1796, (see *Appendix*, No. V. to 2 *Rev. Code*, p. (71.) c. 5.) the title of *Denny Fairfax*, and of those who claim under him, to such of the lands in the *Northern Neck* of *Virginia* as were waste and unappropriated at the time of the death of *Lord Fairfax*, was clearly extinguished.

2. *Quere*. Were the several acts of Assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the *Northern Neck*, equivalent to an *inquest of office*, and sufficient to authorize grants of the said lands by the Commonwealth, independently of the said act of compromise?

3. *Quere*, whether, by virtue of the treaty of 1783, persons born in *Great Britain*, and residing there on the 4th of *July*, 1776, could, without ever thereafter becoming citizens of *Virginia*, or of any of the *United States of America*, take and hold lands in *Virginia*, by descent, or devise, accruing between that day and the date of the said treaty?

4. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term.

for 788 acres of land lying in the County of *Shenandoah*, the parties, by their counsel, on the 9th of *September*, 1793, agreed a case, in substance, as follows:

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1. That the act of Assembly entitled, "an act for confirming and better securing the titles to lands in the *Northern Neck*, held under the Right Honourable *Thomas Lord Fairfax*, &c.(a) truly recites the several grants or charters which were made by the Kings of *Great Britain*, to the predecessors or ancestors of the late *Thomas Lord Fairfax*, of and concerning that part of the territory of the then Colony, now Commonwealth, of *Virginia*, called and known by the name of the *Northern Neck*; and that all the estates, rights and authorities thereby granted to *them* were lawfully vested in *him* previous to the year 1736, and remained vested in him until the time of his death.

(a) 1 Rev.
Code, p. 5.

2. That, in the year 1748, an act of Assembly was passed, entitled, "An act confirming the grants made by his majesty, within the bounds of the *Northern Neck*," &c.(b)

(b) 1 Rev.
Code, p. 10.

3. That the said *Thomas Lord Fairfax*, proprietor of the said territory called the *Northern Neck*, in the year 1748, opened and kept and conducted at his own expense an office within the said *Northern Neck*, for granting and conveying what he described and called *the waste and ungranted* lands therein, upon certain terms, and according to certain rules by him established and published, and that such of the aforesaid lands as were granted and conveyed by him *in fee*, were granted and conveyed, in parcels, in a certain form, set forth at large in *hac verba*; and that the said grants and conveyances in fee were transcribed and entered in books kept by him for that purpose, in the said office, by his own clerks or agents, and were uniformly alike, except as to grants and conveyances of lots in places laid off and designed for towns; that he kept the said office open for the purposes aforesaid, from the year 1748 till the time of his death, which happened in *December*, 1781; during all which time, as well as prior thereto, from the time he became proprietor as aforesaid, he exercised the right of

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granting and conveying in fee-simple, the lands called waste and ungranted lands as aforesaid, upon the rents, conditions and reservations contained in the grants and conveyances made by him; the rents reserved therein were paid to him as they annually accrued; and he also exercised the right of leasing for term of lives and for years (reserving annual rents) parcels of the said lands called by him waste and ungranted; which rents were also paid as they became due.

4. That the said *Thomas Lord Fairfax* was, at the time of his death, and for many years had been, a citizen and inhabitant of the Commonwealth of *Virginia*; that he duly made and published his last will and testament, which is set forth *in hæc verba*, and was admitted to record by the Court of *Frederick County* the 5th of *March*, 1782; in which will he devised all his "undivided sixth part or share of his lands and plantations in the Colony of *Virginia*, commonly called or known by the name of the *Northern Neck of Virginia*, to the Reverend *Denny Martin*, his nephew, of the County of *Kent*, in *Great Britain*, to him, his heirs and assigns for ever; upon condition that he should procure an act of Parliament to pass to take upon him the name of *Fairfax* and coat of arms. And that the defendant *Denny Fairfax* was the same person mentioned in the said will by the name of *Denny Martin*, and that he obtained the name of *Denny Fairfax*, and the *Fairfax* coat of arms, in conformity to the directions of the said will.

5. That the lands in the declaration mentioned are a part of the lands known by the name of the *Northern Neck of Virginia*; and are also the same lands for which a patent was granted to *David Hunter*, the lessor of the plaintiff, by *Beverley Randolph*, Governor of *Virginia*; (which is set forth *in hæc verba*, dated *April 30th*, 1789;) and are part of the lands called and described as waste and ungranted within the said *Northern Neck*, by the said *Thomas Lord Fairfax*, as aforesaid; and are of the value of five hundred pounds current money.

6. That *Thomas Lord Fairfax* died seized in fee of sundry tracts of land in the County of *Frederick*, and other counties in the said *Northern Neck*, containing altogether three hundred thousand acres, which had been granted and conveyed by him to *Thomas Bryan Martin*, in fee, upon the same terms, and in the same forms of other lands conveyed and granted by him in fee as aforesaid, which lands were soon thereafter reconveyed by the said *Thomas Bryan Martin* unto him in fee.

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7. That "the defendant in this suit was born in *England*, a subject to the King of *Great Britain*, in the year 1750, is now, and ever since his birth hath been, a subject to the said King, and hath always inhabited within *England*, as well during the late war between *Great Britain* and *America*, which was ended by the peace made in the year 1783, as in all other times; and hath not made himself a citizen of the *United States of America*, or of any of them, by taking the oath of citizenship required by any law of the said *United States*, or of any one of them, and hath never been in any of the said *United States*, but always hath resided in *England*, where he now remains."

8. That a certain *Thomas Bryan Martin* is now, and always hath been, a citizen of the State of *Virginia*, and is the second son of the sister of *Thomas Lord Fairfax*, and the younger brother of the defendant; and that his said mother is now living, and always has been a *British* subject, and never hath made herself a citizen of the *United States of America*, or of any of them.

9. That a treaty of peace was finally made and concluded in the year 1783, between *Great Britain* and the *United States of America*, in hæc verba.

10. They agreed the several acts of Assembly, entitled, "an act for establishing a land-office and ascertaining the terms and manner of granting waste and unappropriated lands;" (a) "an act declaring tenants of lands or slaves in tail to hold the same in fee-simple;" (b) an act passed in the year 1784, entitled, "an act respecting future confisca-

(a) May,
1779, c. 13.
Ch. Rev. p.
94.

(b) October,
1776, c. 26.
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tions;"(a) an act passed in the year 1785, entitled, "an act for safe keeping the land papers of the *Northern Neck* in the register's office;"(b) an act passed in the year 1779, entitled, "an act declaring who shall be deemed citizens of this Commonwealth;"(c) an act passed in the year 1782, entitled, "an act concerning surveyors;"(d) an act passed in the year 1785, entitled, "an act concerning escheators;"(e) and an act passed in the year 1785, entitled, "an act to extend the operation of an act, entitled, "an act concerning escheators" to the several counties in the *Northern Neck*."(f)

(a) 1784, c. 53.

(b) 1785, c. 67. 2 Rev.

Code, App. No. V. (69.)

(c) May, 1779, c. 55.

(d) October, 1782, c. 33.

Ch. Rev. p. 179.

(e) 1785, c. 63. 1 Rev.

Code, p. 126.

(f) 1785, c. 53. 2 Rev.

Code, App. No. V. (70.)

11. They agreed that the lands in the declaration mentioned had not been escheated and seised into the hands of the Commonwealth pursuant to the two acts of Assembly last mentioned, or either of them; and that no inquest of office of escheat had been taken of and concerning the said lands.

12. They agreed *in hæc verba*, the 24th section of the act passed in the year 1782, entitled, "an act to amend and reduce the several acts of Assembly, for ascertaining certain taxes and duties, and for establishing a permanent revenue, into one act."(g)

(g) October, 1782, c. 8. s. 24. Ch. Rev. p. 176.

13. They agreed that the lessor of the plaintiff is a citizen of *Virginia*, and always has been, and that he entered into the lands contained in his grant or patent aforesaid, in pursuance thereof, and was possessed thereof prior to this suit.

14. They agreed the lease, entry and ouster in the declaration mentioned; and, if, upon the whole matter, the law be for the plaintiff, that judgment be rendered for him for his term yet to come in the lands in the declaration mentioned, and one penny damage; otherwise, that judgment be rendered for the defendant.

The District Court, upon this case agreed, gave judgment for the defendant; whereupon the plaintiff appealed; and, *Denny Fairfax* having afterwards departed this life,

the appeal was revived against *Philip Martin*, his heir at law and devisee.

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This cause was argued in *May*, 1796, before Judges LYONS, CARRINGTON, FLEMING and ROANE, and reargued on *Wednesday, October 25*, 1809, by *Williams* and *Wickham*, for the appellant, and *Call*, for the appellee, before Judges FLEMING and ROANE; (Judge TUCKER not sitting in the cause, through motives of delicacy, being nearly related to a person interested;) but, as the Court went so fully into the subject in giving their opinions, it is thought proper to omit the arguments at the bar.

Monday, April 23, 1810. The Judges pronounced their opinions.

Judge ROANE. This was an ejectment brought by the appellant against *Denny Fairfax*, under whom the appellee claims, in the District Court of *Winchester*.

At the trial, the parties agreed a case in lieu of a special verdict. That case agrees, *inter alia*, various acts of Assembly respecting the territory of the *Northern Neck*, as is therein more particularly stated; the treaty of peace of 1783, between the *United States* and the King of *Great Britain*; the act of 1784, "respecting future confiscations;" that Lord *Fairfax* died, a citizen of this Commonwealth, in *December*, 1781, having devised his lands in the *Northern Neck* to *Denny Fairfax*, who was born in *England* in the year 1750, and has never become a citizen of *Virginia*, or of any of the *United States*; that the land in controversy was a part of the lands in that territory called and described by Lord *Fairfax* as waste and ungranted land; that the appellant obtained a grant therefor, from the Commonwealth of *Virginia*, on the 30th of *April*, 1789, entered, and was possessed in pursuance thereof until ejected; and that no inquisition of escheat or forfeiture was ever found

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in relation to this land, under the ordinary acts on this subject, as extended to the said territory since the death of Lord *Fairfax*.

Referring to the case itself for a more particular statement, these are the facts which seem most important in the present instance: there are other facts which seem to relate to the question whether Lord *Fairfax* had an absolute fee estate in the soil of the said territory, or only a seignioral right thereto; a question unnecessary to be stirred in the present instance, as my opinion will go upon the admission that he had the former. The District Court gave judgment for the appellee, from which an appeal was taken by the appellant to this Court. It is necessary here to state that the judgment was rendered the 24th of *April*, 1794, which accounts for the omission to state in the case agreed, either the treaty of *November* 19, 1794, between the *United States* and *Great Britain*, or the act of compromise of *October* 10, 1796, between the Commonwealth of *Virginia* and the purchasers under *Denny Fairfax*.

On the part of the appellant it is contended, that *Denny Fairfax* was, at the time of the devise in question, and ever after, an alien, and incapable of holding lands in this Commonwealth; that, admitting an inquest of office to have been necessary under the *general* laws as applying to *ordinary* cases, the several acts of Assembly, stated in the case, respecting the mode of acquiring titles to waste and unappropriated lands in the *Northern Neck*, were equivalent thereto, and supplied the place thereof, in relation to such lands, and justified the grant by the Commonwealth; and that the act of compromise of 1796, aforesaid, ceded the title to the appellant, even if it were not complete without it.

On the part of the appellee, on the contrary, it is contended, that the original appellee, *Denny Fairfax*, was capable of taking and holding the land devised to him, until devested by an inquest of office, or some

equivalent act; and that no such act had taken place prior to the treaty of peace, which, it is further alleged, protected his property, and released the right of the Commonwealth to the land in question: it is also contended, that the act of compromise aforesaid (being passed subsequent to the judgment in this case) does not affect it, and cannot be introduced into the cause so as to vary that judgment.

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In the case of *Reed v. Reed*, (MS. April, 1805,) it was solemnly decided by this Court, that a man standing in the predicament of *Denny Fairfax*, is to be considered as an alien under our laws, and that the treaty of peace did not operate to protect or *enlarge* the inheritable rights of *British antenati* accruing *after* the date thereof. These were the points actually before the Court in that case, and, therefore, *judicially* decided: every thing which may have fallen from any of the Judges in relation to other points, or to topics not necessarily presented by the case, I conceive to be *extrajudicial*, and, as such, not entitled to the weight of binding authority. It was not, for example, *decided*, on the other hand, that the descents to *British antenati* accruing between the epoch of the declaration of our independence and that treaty, were protected and *enlarged* thereby; or, in other words, that that treaty should be construed to arrest the operation of the ordinary laws of escheat and forfeiture of the several states: much less was it decided, in that case, or any other within my knowledge, that the several legislative acts stated in the verdict were incompetent to perfect the title of the Commonwealth to the land in question, as being equivalent to inquisitions of office. As, however, although such were the only points necessarily and *judicially* *decided* in the case of *Reed v. Reed*, the question touching the operation of the treaty upon *prior* cases, was discussed much at large by myself, which question now stands for the opinion of this Court, I must beg leave to refer to a *part* of my opinion in that case, as containing the grounds of my opinion in this. What was then entirely *extrajudicial*, and inserted only from the difficulty of taking

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a *partial* view of the subject, I beg leave now to adopt and render *judicial*, it being called for by the actual question depending before us. I regret the necessity of *reading* any part of that opinion; which arises from the lapse of time since it was delivered, and the inconvenient circumstance that the decisions of this Court, of that period, have not yet seen the light, and exist only perhaps in a single manuscript. I regret it, however, the less, because I shall take the liberty, *en passant*, to fortify some of the positions then taken, by means of notes of some *subsequent* decisions in the Supreme Court of the *United States*, and other authorities. If the opinion is long, it must be admitted that the question is important; and I offer it also by way of apology, that we had then to explore the subject in the first instance.

[Here Judge ROANE, read from the notes of his opinion in the case of *Reed v. Reed*, that part thereof which immediately relates to the present question.*]

I have thus endeavoured to shew by referring to and adopting the sentiment I delivered in the case of *Reed v. Reed*, that the treaty of peace has nothing to do with the laws of alienage of the several states; that, if it had any effect upon rights like the present, it would be to *enlarge* a null and defeasible interest into an absolute and indefeasible one, contrary to what is contended for, that the treaty was to protect rights antecedently existing, and that this construction (while there is no strong necessity for it) is opposed by many and insurmountable objections. In relation to cases happening *after* that treaty, the decision in *Reed v. Reed* is a direct authority in the negative: but the question relating to *prior* cases has never been decided, that I can learn, either in this Court or in the Supreme Court of the *United States*. It was not decided in the case of *Marshall v. Conrad*. (MS.) In that case Judges FLEMING and CARRINGTON expressly waived the consideration of the

* See *Appendix*.

operation of the treaty upon it, as being rendered unnecessary by the act of compromise of 1796. Judge *Fleming* considered the case, also, as embraced by the treaty of 1794; as to which, however, his opinion seems to be different from that of the Supreme Court of the *United States* in the case of *Dawson v. Godfrey*, 4 *Cranch*, 321. in which it was held, that a *British antenata* could not recover lands which descended upon her in *Maryland*, in the year 1793. Reposing in that case, therefore, upon the ground of the compromise, in which, I believe, the other members of the Court (myself dissenting) entirely concurred, these Judges did not enter into the great question now before us, which therefore is not concluded by that decision. As for the case of *The Commonwealth v. Bristow*, (MS., Spring term, 1806,) I consider it to be in favour of the appellants. While it decides that a confiscation, which is complete prior to the date of the treaty, (which I shall endeavour to shew was the case in the present instance,) is not affected thereby, it passes no opinion as to the operation of the treaty upon the ordinary laws of alienage of the several states; for the confiscation in question in that case was under the legislative act of 1779, which, the Court properly admitted, (without any inquiry as to the question of alienage,) vested all *British property, then holden*, in the Commonwealth, on the ground of its being the property of *enemies*; and that act (as I think the act of 1782 may be) was properly compared to a general bill of attainder. That decision, however, is important on account of the analogy which holds, as aforesaid, between the general inquisition (if I may so express it) contained in the act of 1779, and that resulting from the act of 1782, hereafter mentioned, for taking possession of the vacant lands in the *Northern Neck*. It is also important in deciding (or considering the case of *Reed v. Reed* to have decided) that *British* subjects were aliens here from the date of the declaration of independence, as is before abundantly stated; from whence it would follow that stronger expressions in the treaty would be necessary to

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operate the effect in question, than under a contrary supposition. The question before us is, therefore, I conceive, entirely open.

Being decidedly of opinion, for the reasons already stated, that neither the treaty of peace, nor the act of 1784 respecting future confiscations, related at all to the subject of alienage, it follows, in my judgment, that the act of 1785, c. 67. was undoubtedly competent to vest the possession of the vacant lands of the *Northern Neck* in the Commonwealth. Except for the bar supposed to be set up by the treaty, to the power of the legislature, this, I presume, would be admitted by the appellee's counsel themselves: but, even admitting the application of the treaty to the case before us, I will go further and contend, that the title of the Commonwealth to the vacant lands of the *Northern Neck* was perfected before the date of that instrument.

Lord *Fairfax* having died in 1781, the legislature of the then sovereign State of *Virginia*, premising that they had reason to believe that the whole of that extensive territory had devolved on alien enemies, turned their attention to the subject in *October*, 1782. By their act of that session, (a) they sequestered the quit rents then due in the hands of the land-holders, ordered all quit rents thereafter accruing to be paid into the treasury, and exonerated the said land-holders therefor. I know of no means more efficacious than this, to have taken possession of the quit rents, and even of the granted lands in that territory, so far as a title thereto existed in Lord *Fairfax*; and, although in *May*, 1783, (b) they released to his executors all the quit rents due at the time of his death, they retained their hold on those subsequently arising, until they finally abolished them by the act of 1785. So much for the quit rents and granted lands in that territory. As to the vacant lands thereof, by their act of 1782, (c) after premising that by Lord *Fairfax's* death great inconveniences would accrue to those inclined to make entries for vacant lands in the *Northern Neck*, they enacted "that all entries made with the surveyors

(a) Ch. Rev.
p. 176. s. 24.

(b) Ibid. 206.

(c) Ibid. 180.
c. 33 of Oct.
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of the Counties within the *Northern Neck*" (which entries were consequently authorized by the act) "shall be held deemed and taken *as good and valid in law*, as those heretofore made under the direction of the said *Thomas Lord Fairfax*, until some mode shall be taken up and adopted by the General Assembly, concerning the territory of the *Northern Neck*." As there could be no conceivable motive with the Legislature to abstain from taking possession of those *vacant* lands, and granting them out, thereby to *settle* the country while it was taking possession of the quit rents and granted lands thereof, the authorizing entries to be made therefor, is as strong a mode as they could possibly have adopted to declare that they then and there took possession of the same. They took possession thereof, and made a temporary and provisional arrangement for granting it away, declaring, at the same time, their intention to adopt another and more definitive mode at a future time. That mode was adopted by the act of 1785, c. 67.; in which, although the executive were directed to take possession of the *land-papers* of the *Northern Neck*, they were not directed to take possession of the vacant lands thereof: such possession had been taken by the act of 1782, and it would have been absurd to have directed it in any other way than by authorizing entries therefor, as the act of 1782 had done, and which amounted, *ex vi termini*, as is before said, to a declaration that the possession of such lands existed in the Commonwealth. On a comparison of this permanent act of 1785, with the temporary one of 1782 aforesaid, it will be found that the former is not only as deficient as the latter in providing any mode of taking possession of the territory other than that of authorizing entries therefor, and *that* in a manner not more strong than that contained in the act of 1782, but has also expressly recognised the entries authorized by that act, and provided for carrying the same into grant. When, therefore, the appellees admit the title of the Commonwealth to the territory in

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question to have been complete, under the act of 1785, but for the alleged bar of the treaty of peace, they must also admit the same in relation to the act of 1782, which was prior to the treaty. By *both* those acts, the whole of that vacant territory was taken possession of by the Commonwealth; and, in relation thereto, the last act was a mere work of supererogation: in fact, this new and ridiculous idea of the *necessity* of ordinary and particular inquests of office, as applying to the case in question, or of any other symbol of investiture, than that most notorious one of all, (an act of the Legislature,) had not then occurred to the mind of the General Assembly: in relation to the Commonwealth, the mere assumption of the lands by law was sufficient, though, as to the grantees of the Commonwealth, other acts were necessary to complete *their* title: it is, however, enough to avoid the bar presented by the treaty that the title (including the possession) of the lands was *then* completely in the *Commonwealth*.

While this *general inquisition* of office, by the Legislature, (if I may so express myself,) was peculiarly adapted to the case of the estate of an individual, which pervaded a great number of the Counties of the Commonwealth, the power of the Legislature to substitute an act for an ordinary inquisition cannot be doubted. It is admitted that an act of Parliament in the reign of *Philip* and *Mary*, declaring the property of Sir *Thomas Wyatt* to be vested and in possession of the King, without any inquest of office, was va-

(a) 2 Tuck. lid.  
Bl. p. 60. note  
C.

lid.(a) That case differs from the case at bar only in degree: and it cannot possibly make a difference that the inquest in that case is expressly waived by the act, whereas in the case before us, it is waived by a strong and necessary implication only: the *words* are wanting, but are more than supplied by the actual measures taken by the Legislature, *eodem flatu*, to grant out the lands to others.

Upon this point of the competency of a *general legislative act* to supply the place of particular inquisitions of

office, I consider the case of *Kinney v. Beverley*(a) as a direct and pointed authority. In that case, the title of the appellant was reprobated, only on the ground that the lands alleged to be vested in the Commonwealth, by reason of non-payment of taxes, and which were regranted to him, had not been listed by a County Commissioner. This was decidedly the ground of the decision of the Court in that case, as appears by the report thereof. Although the lands in dispute in that case stood upon a common foundation with those before us, both as to the want of particular inquisitions of office, and also as to the non-existence of any other mode of taking possession thereof by the Commonwealth, except by authorizing grants to others, the above was the *only* ground on which the pretensions of the appellant failed : and *this*, although the necessity of particular inquisitions, as applying to every case, was suggested by counsel, and much laboured by one of the Judges of the Court. That case is much stronger in this respect than the case before us : for there the lands of *thousands* of individuals, who were *not named* in the act, and whose lands lay *sparsim* throughout the Commonwealth, were liable to be affected, whereas, in the case before us, the lands of one individual (by name) were taken into the hands of the Commonwealth. In short, if this objection, for the want of a more particular inquisition, exists in this case, it equally exists in relation to the act of 1785, (considered as unaffected by the treaty,) and would go to overthrow every title acquired under it !

I am thus of opinion that the treaty of peace applies not to this case, nor to arrest the operation of the laws of alienage in the several states ; and that, even if it does, the title of the Commonwealth to the land in question having been *perfected* by a seisin under the act of 1782, or, in other words, the confiscation being *complete*, that treaty had nothing left whereupon to operate.

This view of the subject makes it unnecessary for me to say much in relation to the act of compromise of 1796.(b) By the compromise contained in that

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(a) 2 H. & M.  
344.

(b) *Sess. Acts*,  
c. 14.



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act, the purchasers under *Denny Fairfax*, in consideration of a release, by the Commonwealth, of its claim to "any lands *specifically appropriated* by Lord *Fairfax* to his own use either by deed or actual survey," agreed to release to the Commonwealth "all claim to lands supposed to lie within the *Northern Neck*, which *were waste and unappropriated* at the time of the death of Lord *Fairfax*;" and the act has particular relation to, and was intended to settle and determine *this*, among other suits, then depending in this Court, touching the right to the said lands. Of this compromise the said purchasers have already *availed themselves*, by reversing two judgments in favour of the Commonwealth, on the 10th of *October*, 1798; a record of one of which is now before me. I consider the compromise as having been deposited with the Court for the purpose of settling all the causes embraced thereby, according to the provisions thereof: and I can never consent that the appellees, after having got the benefit thereof, should refuse to submit thereto, or pay the equivalent; the consequence of which would be, that the Commonwealth would have to remunerate the appellant for the land recovered from him! Such a course cannot be justified on the principles of justice or good faith; and, I confess, I was not a little surprised that the objection should have been raised in the case before us.

On every ground, therefore, I am of opinion, that the judgment of the District Court should be reversed, and entered for the appellant.

Judge FLEMING. The counsel for the appellant, who was plaintiff in the Court below, has made three points, in support of his cause;

1. That *Denny Fairfax* was, at the time of the decease of Lord *Fairfax*, and ever after, an alien, incapable of *holding* lands within this Commonwealth.

2. That the several acts of Assembly respecting the acquiring title to waste and unappropriated lands within the

*Northern Neck*, were a sufficient inquest of office to authorize the granting the lands to the appellant. And,

3. That the act of compromise between the purchasers of *Denny Fairfax* and the Commonwealth, vested the lands in *Hunter*, even if his title was not complete prior thereto.

With respect to the first point, the counsel seems to admit (by not denying it) the right of Lord *Fairfax* to *devise* the land in question, which renders an inquiry into the nature of *his* title unnecessary: we are then to consider whether *Denny Martin* was incapable of holding the lands so devised to him, lying within this Commonwealth?

It has been settled in the case of *Marshall v. Conrad*, (and I believe it is not, or ought not, to be controverted, at this day,) that an alien may take land within the Commonwealth by purchase, as well by devise as by grant or other conveyance, and hold the same until something further be done, to divest him of his right, to wit, *office found*; which must be done before any title can vest in the Commonwealth during the life of the devisee.

The case agreed between the parties, in the nature of a special verdict, finds, among others, two acts of Assembly passed in the year 1785, the first entitled, "An act concerning escheators." (It should have been in the year 1779 instead of 1785.) (a) And the other extending the operation of the former act to the several Counties in the *Northern Neck*: and then they agree that the lands in the declaration mentioned have not been escheated and seised into the hands of the Commonwealth, pursuant to the two acts of Assembly last mentioned, or either of them; and that no inquest of office of escheat hath been of and concerning the said lands. And this brings me to consider the second position of Mr. *Williams*, that the several acts of Assembly respecting the acquiring title to waste and unappropriated lands within the *Northern Neck*, were a sufficient inquest of office to authorize the granting the lands to the appellant; and both of the counsel argued that the Govern-

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(a) May, 1779,  
c. 45. Ch. Hist.  
106.

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(a) October,  
1779 c 15 Ch.  
Rev. 110.

ment, or Legislature, might have an office taken, and confiscate the land by any mode they pleased. *That*, as a general principle, is not denied; but then the *mode* ought to be explicit, and clearly understood by all persons interested, and not by implication, that such and such acts of the Legislature, by strained construction, *amount to an office found*, to deprive any person, whether citizen or alien, of their justly acquired rights. More especially, as the Legislature had already acted on the subject, and by the acts of *May, 1779*, concerning escheators, and the amendatory act of *October* following, (a) clearly pointed out a mode by which, with great solemnity, those inquisitions of office were to be taken, giving to *British* subjects, or other persons in their behalf, the right of being heard before the General Court, by a *monstrans de droit*; and to any person other than a *British* subject, a right either to traverse the office, or to be heard on a *monstrans de droit*, in the General Court.

I proceed to examine the acts of Assembly, or clauses of them, as are supposed to amount to such an inquest of office as authorized the granting the lands to the appellant.

The first that occurs is the 24th section of the act of 1782, c. 8. "To amend the several acts of Assembly for ascertaining certain taxes and duties, and for establishing a permanent revenue, into one act," whereby, after suggesting in a preamble, that since the death of the late proprietor of the *Northern Neck*, there is reason to suppose that the late proprietorship hath descended upon alien enemies, it is enacted, "that persons holding land in the *Northern Neck* shall retain, sequestered in their hands, all quit rents which are now due, until the right of descent shall be more fully ascertained, and the General Assembly shall make final decision thereon; and all quit rents which hereafter may become due, within the limits of the said *Northern Neck*, shall be paid into the public treasury, under the operation of the laws of this session of Assembly; for which quit rents the inhabitants of the said *Northern Neck* shall be exonerated from the future claim of the proprietor."

At the same session of Assembly, an act passed, (c. 33.) entitled, "An act concerning surveyors," in the 3d section of which, after reciting, that the death of the Right Honourable *Thomas Lord Fairfax* might occasion great inconvenience to those who might incline to make entries for vacant land in the *Northern Neck*, it was enacted that all entries made with the surveyors of the Counties within the *Northern Neck*, and returned to the office formerly kept by the said *Thomas Lord Fairfax*, should be held, deemed, and taken, as good and valid in law, as those before made under the direction of the said *Thomas Lord Fairfax* until some mode should be taken up and adopted, by the General Assembly, concerning the territory of the *Northern Neck*.

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At this period, then, (*October*, 1782.) the Legislature was quite undetermined on the subject of this territory, and had done nothing that squinted at an inquisition of office: and, therefore there was, from any act of government at that time, scarce a semblance of a title vested in the Commonwealth; as the clauses just above recited seem to have been enacted merely for the convenience of those who were resident, and had acquired permanent titles to their lands within the territory, and also of those who were taking steps to acquire titles to lands therein.

Thus the matter rested until the ratification of the treaty of peace, in *September*, 1783; at which time the land in question was held by *Denny Fairfax*, under the will of *Lord Fairfax*, as no confiscation thereof had ever taken place; and, by the 6th article of the treaty, it was stipulated that there should be no future confiscations made, nor any prosecutions commenced, against any person or persons for, or by reason of, the part which he or they may have taken in the war, and that no person, on that account, should suffer any future loss, or damage, either in his *person*, *liberty*, or *PROPERTY*. And so sacred was the treaty held by the Legislature of the state, that in an act passed in *October*, 1783, (c. 17.) prohibiting the migration of certain persons

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to this Commonwealth, there is a *proviso* that nothing therein contained should be construed so as to contravene the treaty of peace with *Great Britain*, lately concluded. And in *October, 1784*, (c. 53.) an act passed, entitled "*An act concerning future confiscations*," in which, after reciting that it is stipulated by the sixth article of the treaty of peace that there shall be no future confiscations made, it is enacted, *that no future confiscations shall be made*, any law to the contrary notwithstanding. With a *proviso* that the act should not extend to any suit depending in any Court, which commenced prior to the ratification of the treaty of peace; which treaty, aided by the last recited act, in confirmation thereof, completed, in my conception, the title of *Denny Fairfax* to all the lands devised to him by Lord *Fairfax*; in which *he*, by the *devise*, acquired the *same interest* as was vested in the devisor, at the time of his death; as the treaty, in my apprehension, by the general wording of the sixth article, operated as forcibly, and effectually, on the subject now under consideration, as if it had been *specifically* stipulated that the estate devised by Lord *Fairfax* to *Denny Fairfax* should not be confiscated; or, in other words, that it should not (nor any part thereof) be seised, taken, or appropriated to the use of the Commonwealth, and the act of 1784 had been penned in exact conformity to such stipulation. It was a solemn compact of the highest nature and dignity known in civil society; and, if there be any thing ambiguous, or doubtful in it, ought to be construed in the most liberal and beneficial manner, in favour of the party for whose benefit there may be any article inserted therein; and ought not, in my conception, to have been contravened, or impaired, by any legislative act of our government. But it is contended that the act of 1785, c. 67. "*for the safe keeping of the land papers of the Northern Neck in the register's office*" operated as an inquest of office, and gave to government the right of granting the unappropriated lands in the *Northern Neck*. To this I answer, that the treaty of

peace, as recited above, and so solemnly recognised and acted upon, by the Legislature but the preceding year, absolutely forbids such a construction: and, it appears to me, therefore, that the granting the land in question to the appellant, in the year 1789, was an exercise of power, without a right.

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3. We come now to consider the third point, "that the act of compromise between the purchasers of *Denny Fairfax* and the Commonwealth, vested the lands in *Hunter*, even if his title was not complete prior thereto." This point seems in favour of the appellant; and the only doubt and difficulty with me was, whether, as the act is *not noticed in the case agreed*, the Court ought, *ex officio*, to take notice of it? and, if so, the only question will be, whether the land in controversy had been specifically appropriated and reserved by Lord *Fairfax*, or his ancestors, for his or their use? On reflecting upon the subject, my doubt is removed. By a clause in our act, for limitations of actions, &c. *private* acts of Assembly may be given in evidence, though not specially pleaded: *à fortiori*, shall *public* acts be noticed, in all cases, to which they apply; whether specially referred to, or not. By the act of compromise passed the tenth day of *December*, 1796, (at which time there were several suits depending between the Commonwealth and those who claimed under the will of Lord *Fairfax*, in regard to their respective rights,) the immediate purchaser of *Denny Fairfax*, who claimed under the will of *Thomas Lord Fairfax*, gave up all claim to the lands supposed to lie within the *Northern Neck*, which were waste and unappropriated at the time of the death of Lord *Fairfax*, in consideration that the Commonwealth relinquished all claim to the lands specifically appropriated by the late *Thomas Lord Fairfax*, or his ancestors for his or their use. The case before us, then, comes expressly within the provisions of the act: and, it being stated in the case agreed, that the lands in the declaration mentioned are a part of the lands called and described as waste and unappropriated, within

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the said *Northern Neck* by the said *Thomas Lord Fairfax*; the title of *Denny Fairfax*, and of those who claim under him, was, *by the act of compromise*, clearly extinguished. And, *upon that ground, and upon that only*, I am of opinion that the law is for the appellant, and he must have judgment accordingly.

Judgment REVERSED, and entered for the *appellant*. And it appearing that the appellant's term in his declaration mentioned has expired, liberty was given him to amend the same by striking out the word "*ten*" and inserting the words "*twenty-three*."

To this judgment the appellee obtained a writ of error (a) *See Laws of the United States*, vol. 1. now pending and undetermined.
p. 63. s. 25.



Tuesday,
April 24.

Betts against Cralle.

1. If an attorney in fact undertake to have a tract of land (with the situation of which he does not profess himself personally acquainted) surveyed for a part thereof, and upon terms "*in case the land cannot be found, to have a proportional part of the damages which may be recovered by his employer of the person of whom he bought, and a proportional part of his expenses paid,*" he is not bound to have it done *at all events*; but only to a faithful performance, according to the best information he can obtain.

2. In this case, therefore, the attorney in fact being imposed upon by the County Surveyor, and, in consequence of such imposition, having a survey made of land not purchased by his employer, was held not responsible for his mistake, and not thereby barred of his claims under the contract.

3. But, after the survey, the employer having executed a bond to the attorney to make him a conveyance of part of the land so surveyed; and having snatched and torn the bond so given; for which trespass a suit was threatened; and, thereupon, having given two bonds for money in full satisfaction for tearing the above bond, and for the attorney's services; the last-mentioned bonds were considered as a bar to any claim of the attorney under the original contract, and adjudged valid and obligatory, notwithstanding the mistake in the survey was not discovered until after those bonds were executed.

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secure for him a tract of 3,000 acres of land which he had purchased of *Christopher M'Conico*; being part of a larger tract, which, as the complainant had been informed, had been located and surveyed for the said *M'Conico*; that the defendant undertook *faithfully* to transact the said business, for which the complainant agreed to allow him 300 acres, part of the said 3,000 acres: the said *Betts* thereupon went to *Kentucky*, and had a survey of a certain 3,000 acres of land made, purporting to be part of the said *M'Conico's* land, and then returned, bringing with him a plat and certificate of the said survey, which, on the face thereof, appeared to be regular and correct: the complainant thereupon supposed that the said *Betts* had really had the land properly surveyed, and hesitated not to allow him the said 300 acres of land for his trouble; but, as the said *Betts* was *desirous* to take money for the said land, (which the complainant preferred,) he gave him his bond for 100*l.* payable *December 25, 1796*, and another bond for 50*l.* payable *December 25, 1797*, being the sums and times of payment which the said *Betts* agreed to take for the said land; and, still supposing all was right, he had *paid*, and taken in, the said bond for 100*l.*; but, to his utter astonishment and mortification, had *since* discovered that the whole survey made as aforesaid by the said *Betts* was erroneous, and contained no part of the land which he bought of *M'Conico*, but was located upon lands belonging to other people: "the said *Betts* must have been guilty of a fraud or criminal neglect of his duty as attorney, because he had a *true plat of M'Conico's land*, by which he might have made a true survey, which he had not done." The complainant had, therefore, "under the influence of a deception, and *without any consideration*," paid the said sum of 100*l.*; and yet the said *Betts* had brought a suit, and recovered a judgment against him on the said bond for 50*l.* He therefore prayed an injunction, which was granted.

The defendant filed his answer, stating that he had got the surveyor of *Harrison County, Kentucky*, in which the

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lands were said to be situated, to survey 3,000 acres, part of *M'Conico's* grant, according to copies of the said grant, and of the agreement with the said *M'Conico*, furnished him by the complainant; a fair and true copy of which survey, signed by the said surveyor, he produced to the complainant on returning from *Kentucky*; that, upon producing the same, the respondent demanded the complainant's bond to make a title to 300 acres, part thereof, agreeable to contract, which he then refused to give; after which the complainant applied to the respondent for a copy of said plat, and said that *he* would go out to *Kentucky* himself, and, in case he should find the services aforesaid had been rendered, he would, on his return, give his obligation to make a title to 300 acres of said land to the respondent; that a copy of said plat was accordingly delivered the complainant in 1795; that he went to *Kentucky*, and (the respondent hoped to prove) viewed the lines of the said land, and had the same transferred from *M'Conico* to himself, by the Commissioners in that country, and was so well pleased that, shortly after his return to this State, (*viz. October 28, 1795.*) he gave his bond in the penalty of 300*l.* with condition to convey to the respondent a good and sufficient title to 300 acres, part of the said 3,000 acres of land, agreeable to the original plat which was then before him, specifying where to begin, and how to be extended for quantity; that there were only two witnesses then present who attested the bond; and, the contract being for *land*, the respondent supposed it necessary to have a third witness, and about three days after, applied to the complainant to reacknowledge said bond, which he consented to do; and, the third witness being called upon, and the bond produced by the respondent, to the great astonishment of the respondent, the complainant made a most indecent catch at the said bond, and tore nearly half of the same off, having his name on the part which he so disgracefully snatched away. The respondent, therefore, being about to commence a suit against the complainant

for his conduct aforesaid, the said complainant agreed to give his two bonds, in the bill mentioned, for 100*l.* and 50*l.*, to the respondent, provided he would quit all claim to the said 300 acres of land; all which was immediately agreed upon; the bonds were executed, and the original plat delivered up to the complainant; that, about two days afterwards, the complainant was offered 50*l.* cash more than he had allowed the respondent for said 300 acres of land, which he refused to accept, as he had previously viewed the said lands, and knew they were valuable.

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The respondent denied all fraud on his part; declaring that the copy of the grant furnished him by the complainant (the water-courses corresponding with the survey which he caused to be made) was all the guide he had in the agency intrusted to him; and concluded with praying a dissolution of the injunction.

Sundry affidavits were taken which fully proved the circumstances set forth in the answer, relative to the complainant's executing, and afterwards snatching and tearing his bond for the 300 acres of land, and relative to his giving the bonds for 100*l.* and 50*l.*, "which were understood to be in full satisfaction for the *breach* of *Crallè* in tearing the above bond, and also full compensation to the said *Betts* for his services rendered the said *Crallè* in *Kentucky*," but on *Crallè's* behalf, it appeared in evidence that *Betts*, when he applied for the first mentioned bond, wanted his 300 acres laid off in a certain part of the land where he said there was to be a ferry place; that *Crallè* refused to give the said bond until *Betts* agreed to have them laid off in another place; and that, after it had been signed, the said *Betts* said that he had got the land in the very place he wished it, being the part to which *Crallè* had objected.

The deposition of *John Tittle*, the surveyor, stated, that he was called upon by the defendant as agent for the complainant, to shew *M'Conico's* survey, and lay off and survey 3,000 acres out of the same for the complainant; that,

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having surveyed an entry made in the name of a certain Mr. Logwood, which called to adjoin *M^cConico's* west line, he supposed he could find said *M^cConico's* survey; that he went in search of *M^cConico's* lines, but, not finding any, proceeded to lay off the complainant's 3,000 acres; and that he had since found, from the copy of *M^cConico's* entry, that the said 3,000 acres were not within 240 poles of said *M^cConico's* survey aforesaid. From other evidence it appeared that this discovery was made in the fall of 1796; after Crallé had given the money bonds, but before that for 100*l.* had become due.

The defendant proved by the affidavit of John Knight, jun. that, in September, 1795, the witness was in the state of Kentucky, and accompanied the complainant and the same surveyor to see the 3,000 acres of land, said to have been surveyed out of *Christopher M^cConico's* survey; that the surveyor then said he had laid off the same at the instance of Charles Betts, attorney in fact for the complainant; that they examined the greater part of the corners and lines of the said land, and found them plainly and well marked: the complainant expressed himself much satisfied at the faithful execution of the business by his said attorney; so much so, that he had 400 acres (part of the said 3,000) laid off, which he had previously sold to a certain James Claughton then present. The witness heard nothing said in contradiction to the validity or legality of the said survey of 3,000 acres; but understood it was generally believed by the neighbours to be a part of a large survey granted to *Christopher M^cConico*.

Among the exhibits were copies of *M^cConico's* grant, for 14,137 acres, by certain metes and bounds expressed therein, and of his obligation to Crallé, to make him a title "to a certain tract or parcel of land containing 3,000 acres, lying and being in the County of Fayette," (from which Harrison County was afterwards taken,) "in the District of Kentucky, and bordering on Main Licking Creek, being a part of the grant above mentioned;" but without specifying any

other boundaries; also, a copy of the survey made for *Betts*, attorney for *Crallè*, purporting to be of 3,000 acres out of a survey of *Christopher M'Conico's*, containing 14,137 acres; "beginning at a beech on the said *M'Conico's* west line, on the bank of *Main Licking*," &c.

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The County Court dissolved the injunction, and afterwards dismissed the bill: but, on an appeal, the late Chancellor *WYTHE* reversed their decree, with costs; and adjudged and decreed that *Betts* should refund the 100*l.* he had received, with interest thereupon from the time of such receipt until paid; that the injunction be made perpetual; that *Crallè* convey, with warranty, against himself, and claimants under him only, to *Betts*, at his costs, the said *Crallè's* right to 300 acres of land, part of the 3,000 acres certified by *John Tittle* to have been surveyed by him; and that *Betts* pay to *Crallè* his costs in the County Court: from which decree *Betts* appealed.

Wickham, for the appellant. The testimony clearly proves that *Betts* did every thing in his power to secure the land. The fault, therefore, was in the surveyor; or, perhaps, *M'Conico's* land was ideal; for there is no evidence that it could be found at all. But, however this might be, *Crallè* was guilty of very improper conduct in snatching the bond out of *Betts's* hand, and tearing it. A compromise was afterwards made, which closed the previous transactions. It was agreed that *Crallè* should pay 150*l.* at several payments, in full compensation for tearing the bond, and also for *Betts's* services in *Kentucky*; and this compromise ought not now to be disturbed.

There is no ground to impute to *Betts* any unfair conduct. He (as well as *Crallè* himself) was imposed upon by the surveyor; and, where there is no fraud, the equity on both sides being equal, the law should prevail. Besides, *Crallè* may still sue *M'Conico* for damages, if his land be really lost; or may maintain an action against the surveyor: but *Betts* has no remedy, except against

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Cralle, for the great trouble and expense which he incurred on his account.

Call, contra, did not pretend to justify *Cralle's* conduct in tearing the bond; but neither could *Betts* be justified in endeavouring to impose on him. According to the terms of the *original agreement*, all that *Betts* had a right to, (the land being lost,) was his *proportion* of such *damages** as might be recovered of *M^cConico*; but he was certainly not entitled to the *land*, having not complied with the agreement on his part. The *first* bond, therefore, smells of imposition; being for an *absolute* conveyance of 300 acres of *land* which *Betts* was not entitled to; and the *last* bonds were without any consideration at all. *Cralle's* weakness and fear of being prosecuted for tearing the bond, are not sufficient reasons to bind him. There is strong reason from the testimony to believe that *M^cConico's* *land*, with due diligence, might have been found. If a man *covenant* to do a thing, he is bound to do it at all events, if it be *practicable*. Nothing can discharge him, but proving it to be impossible.

The decree was right, except that the Chancellor ought not to have given *Betts* the land: for he is not entitled to any thing.

Wickham, in reply. The Chancellor's directing the 300 acres to be conveyed was a matter of *moonshine*; having himself decided that no such land existed. Mr. *Call* sets off the improper conduct of *Betts* against that of *Cralle*:

* Note by the Reporter. The *original agreement*, bearing date the 13th of *March*, 1794, (which was among the *exhibits*, though not described as a *written* contract, either in the bill or answer,) contained a clause "that in case the land could not be found, *Betts* was to have, in proportion of money and damages that *Cralle* might recover of *M^cConico* for his non-compliance in making him a lawful title to the said 3,000 acres of land, as 300 is to 3,000; and the said *Cralle* was to bear the above proportion of the expenses attending the laying off the said 3,000 acres of land, and other contingent expenses, in like proportion as 300 is to 3,000.

but there is no proof of any improper conduct on the part of *Betts*; nor even of any negligence. It was his own interest to find the land; for he was to have part of it. *Cralle's* own measure of diligence was a good rule to measure that which *Betts* was bound to exert. He went himself to *Kentucky*, and had the *same land* surveyed. The bond for the 300 acres was not a void act. The parties were able to bind themselves by their contract, and did so. Mr. *Call* contends that *Betts* committed a *fraud* in taking that bond; the condition being to make an *absolute* conveyance. But, the bond having been destroyed by *Cralle*, this cannot now be *presumed* in *his* favour: on the contrary, the bond should be presumed to have been in pursuance of the contract.

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Neither is there any proof that the money bonds were obtained by *terror*. *Betts* accepted them *in bar* of his claim under the *original* contract, as well as *in satisfaction* for the *trespass*. How, then, can he have the benefit of *that* contract now? The Chancellor ought, indeed, upon *annulling* the compromise, to have restored us to our original cause of action: but this he has not done.

Friday, April 27th. The Judges pronounced their opinions.

Judge TUCKER. The circumstances of this case appear to be extremely hard. The complainant appears to be a loser, without the fraud, default, or neglect of the defendant, who seems to have proceeded to perform his undertaking to have the lands, purchased of *McConico*, in *Kentucky*, surveyed with fidelity, and, as far as in him lay, with prudence and discretion. The county surveyor, a sworn public officer, was, of all others, the person most proper to apply to, to point out and divide lands located in a wilderness. That the surveyor acted unfaithfully appears evident from his own depositions. He imposed first upon *Betts*, and afterwards upon *Cralle* himself. It would seem

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to me that the bond which *Crallé* tore, being given by him and accepted by *Betts* for a conveyance of lands therein particularly described, was pleadable in bar of any action or suit for a specific performance of the *original contract*, or for damages for the breach thereof; (except, perhaps, for *expenses* incurred by *Betts*;) consequently, Mr. *Call* is mistaken in supposing *Betts* might still avail himself of that contract. The second and third bonds, given when the compromise took place, not only in full satisfaction for the 300 acres of land claimed by *Betts*, but as full compensation to him for his *services* rendered, cannot therefore be said to have been given without any consideration. *Crallé* either has or may have, the whole lands, *now*, if found; or, if they cannot be found, he has his action against *M'Conico* for damages. Of those damages *Betts*, under the original contract was entitled to a proportion; to which, as also to all other recompense for his trouble and expenses, he has by the compromise yielded all claim. I cannot think it competent to a Court of Chancery to set aside so many deliberate acts between the parties, and reinstate the original contract between them. I am therefore of opinion, that the Chancellor erred in reversing the decree of the County Court, and that his decree ought to be reversed, and that of the County Court established and affirmed.

Judges ROANE and FLEMING, were of the same opinion. The decree of the Chancellor was therefore unanimously reversed, and that of the County Court affirmed.

Marshall against Frisbie.

Monday,
April 30.

IN an action of trespass on the case by *Nathaniel Frisbie* against *Almarine Marshall*, in the County Court of *Wythe*, a commission was granted the defendant on the 15th of *June*, 1796, to take the deposition of *Philip Dick*, of the city of *Philadelphia*; "and *Benjamin Jones*, *William Kenner*, and any three aldermen of the said city, to take the same by consent of the parties;" and the same was granted the plaintiff. On the 11th of *July*, 1797, by consent of the parties, it was ordered that a commission issue "to any four aldermen of the city of *Philadelphia*, and *William Kenner*," to take the deposition of the same witness. *September* 14th, 1797, the following order was entered: "Continued at the plaintiff's costs. And, by consent of the parties, order granted for new commissions to take depositions."

A commission was issued, *November* 24th, 1798, "to *Reynold Keen*, gent., alderman of the city of *Philadelphia*, and *John Gibson*, *William Rogers*, *Robert Underwood*, and three of whom to act, if the whole cannot," should be presumed to have been directed to persons agreed upon by the parties, but whose names were omitted by the Clerk in entering the last order; no objection having been made, in the Court below, on account of any real or supposed variance between the first and second orders and the commission.

2. A commission directed to five persons, ("any three of whom to act," cannot be executed by one only: and a return, by one, that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who were present.

3. A deposition, taken at a time and place not mentioned in the notice, may be read as evidence; an agent of the party to whom the notice was given, duly authorized to attend to the taking of such deposition, having appeared at the time and place appointed, and consented to a postponement to such other time and place. And if, in other respects, the commission be regularly executed and returned, the Court will presume from circumstances, that the person who gave the consent was the authorized agent of the party.

4. *Quere*, whether Commissioners appointed to take depositions can, "by their own mere authority, adjourn the taking thereof to any other convenient time and place, in the event that the business cannot readily be finished on the day, and at the place, to which the notice applies;" no intended adjournment, from day to day until the business be finished, being expressed in such notice?

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David Denniston (any three of whom to act if the whole cannot) of the same city," &c. in the usual form.

The notice from *Frisbie* to *Marshall*, appointed "the house of *Philip Dick*, grocer in Market Street, *Philadelphia*, on the 19th day of *December*, 1798," to take the deposition which was taken and certified in the following manner:

"*Philadelphia, ss.* By virtue of a commission from the Commonwealth of *Virginia*, issued, &c. to me *Reynold Keen*, one of the aldermen of the said city directed, I was called upon the 19th day of *December*, inst. by *John Gibson*, *William Rogers* and *Robert Underwood*, to go to the house of *Philip Dick*, in the said city, to take his deposition in an action now depending, &c.; and *William Jones* likewise appearing on the part of the defendant; it was agreed by the said *John Gibson*, *William Rogers*, and *Robert Underwood*, the Commissioners in the said commission named, as well as on the part of *William Jones*, the defendant's representative, that the taking of the deposition be postponed to the 21st *December*, then for the greater convenience to meet at the office of the said alderman *Reynold Keen*. Whereupon, this said 21st of *December*, 1798, I have caused to come before me the said *Philip Dick*, in the presence of the said Commissioners, and in the presence of *William Jones*, the representative of the said defendant, and he the said *Philip*, being sworn, &c. did depose and say," &c. (here inserting his testimony; and concluding as follows:) "The foregoing with the interrogatories sworn to and subscribed before *Reynold Keen*. *P. Dick.*" On the 12th of *June*, 1799, 10th of *April*, 1799, and 12th of *November*, 1800, Juries were empannelled, but not agreeing, were discharged, the plaintiff having at the trials on the 10th of *April*, 1799, and 12th of *November*, 1800, offered in evidence the deposition taken as aforesaid, to which the defendant excepted, but his objections were overruled. On the 13th of *June*, 1800, a verdict was found for the defendant, but a new trial awarded.

August 12th, 1800, a *dedimus* was granted the defendant to take the depositions of *Philip Dick* and *William Jones*, of the city of *Philadelphia*; but whether he ever took their depositions accordingly does not appear.

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A fifth Jury was empannelled the 15th of *April*, 1801, when the *plaintiff* again offered in evidence the same deposition; "and the *defendant* by his counsel objected to the reading thereof, because, 1st. The commission was directed to *five* Commissioners, (any three of them to execute,) and it was *subscribed*, and from the face thereof, as he contended, appeared executed by *one* only; 2dly. It was not taken at the time and place mentioned in the notice; and, 3dly. By no evidence other than the deposition itself did it *now** appear that *William Jones* was the agent of the defendant, or had authority, either express or implied, to consent to the postponement until the 21st of *December*, 1798, and to a different place."

The Court overruled the defendant's objections; and permitted the deposition to be read to the Jury, who returned a verdict for the plaintiff for 120 dollars damages; and judgment was accordingly entered, which, on an appeal to the District Court, was affirmed; whereupon the defendant appealed to this Court.

Wickham, for the appellant.

Hay, for the appellee.

* Note by the Reporter. In the former bill of exceptions, filed in *April*, 1799, the defendant alleged "that *William Jones* did not appear to have been constituted his representative with authority to do any thing "except attend to the taking of the deposition." And in the bill of exceptions, filed the 12th of *November*, 1800, the same allegation was in substance repeated; the defendant contending "that *Jones* had not an *absolute* authority, but only a power to attend at the time designated in the notice." On both those occasions a witness proved the defendant's acknowledgment that he had authorized *Jones* to attend to the taking of the deposition; the witness using in the first instance, the words "in his stead;" and in the last instance, the words "and to act as his agent therein."

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Friday, May 11. The Judges pronounced their opinions.

Judge TUCKER. The only question in this cause is, whether the deposition of one *Philip Dick*, taken in *Philadelphia*, by virtue of a commission from the County Court of *Wythe*, ought to have been read in evidence at the trial.

The act of 1792, 1 *Rev. Code*, c. 141. s. 13. authorizes the issuing of a commission directed to *such Commissioners*, not exceeding five, *as shall be nominated and agreed on by the parties litigant*.

On the 15th of *June*, 1796, a commission was granted the defendant to take the deposition of *Philip Dick*; and *Benjamin Jones*, *William Kenner*, and any three aldermen of the said city were to take the same *by consent of the parties*; and the same was granted the plaintiff.

On the 11th of *July*, 1797, *by consent of the parties*, it was ordered that a commission issue to any four aldermen of the city of *Philadelphia*, and *William Kenner*, for the same purpose. *September 14*, 1797, the cause was continued at the plaintiff's costs, and, *by consent of parties*, an order was granted for new commissions to take depositions.

A commission was issued on the 23d of *November*, 1798, directed "to *Reynold Keen*, gentleman, alderman of the city of *Philadelphia*, and *John Gibson*, *William Rogers*, *Robert Underwood*, and *David Denniston*, (any three of whom to act if the whole cannot,) of the same city, greeting, &c."

This commission does not conform to the *consent order*. 1st. The name of WILLIAM KENNER is not in it. And, 2dly. It is not directed to *John Gibson*, and the other three as aldermen, nor do they appear to have been aldermen. For, although the order of the 11th of *July*, 1797, was not carried into effect before the next term, I consider the order of *September 14* following, not as *revoking*, but, as *extending the time* for the execution of it: and, consequently, that the commission ought to have conformed to it.

Again, the deposition is certified only by *Reynold Ksen*, and not by any other of the Commissioners, as it ought in my opinion. Both the commission, and the execution of it, being thus manifestly defective upon the face of them, the deposition ought not to have been read. The judgment, therefore, ought to be reversed; and a new trial awarded, with directions not to permit the deposition to be read on such trial.

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Judge ROANE. Several objections have been made to the reception of the deposition stated in the bill of exceptions. It is first said, that there is no proof that *W. Jones* was the agent of the appellant; without which, it is also alleged, the deposition could not properly have been taken on the day and at the place in which it was taken. Several answers occur to this objection. In the first place, I apprehend that the Commissioners, by their own mere authority, could have adjourned the taking of the deposition to any other *convenient* time and place, in the event that the business could not readily have been finished, on the day and at the place to which the notice applied. In the next place, if it were necessary, and the execution of the commission were in other respects regular, I would *presume* that *W. Jones* was constituted by the appellant his agent, for the purpose of taking the deposition: I would presume this, because *P. Dick* was considered by the appellant himself as a *material* witness for him, as appears by the orders for commissions, granted *at his instance*, on the 15th of *June*, 1796, and 12th of *August*, 1800, and it is natural to suppose, that a man would appoint *an* agent to attend to the examination of a *material* witness: I would also easily presume that *W. Jones* was *this* agent, because (in addition to other considerations) a confidence in him may be in some degree inferred, on the part of the appellant, from his having considered *him* also as a material witness; having included him in the order for a commission of the 12th of *August*, 1800.

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Another objection (if I understood the counsel rightly) was, that there was a variance between the order for the commission, and the commission itself, in this, that the former requires the latter to be directed to five *aldermen*, any three of whom are authorized to act, whereas it does not appear by the commission, or return, that more than one of the persons, to whom the commission under which the deposition was taken, was an alderman. That objection of variance applies, it is true, to the order of 12th of *August*, 1800; but it was not under that order that the commission issued, but under that of 14th *September*, 1797, as appears by the *date* of the commission itself, it being the 23d *November*, 1798; and it does not appear that that order of 14th *September*, 1797, made *aldermen* indispensable, as Commissioners; and, as the arrangement for the commission was *by consent of parties*, there is no ground to say that the commission in question is in this respect objectionable. I consider this order of 14th *September*, 1797, and not those of a prior date, as the one under which the deposition was taken; and that the former commissions were superseded by the latter, by which alone we are to be governed.

I should, therefore, readily get over all these objections: but this commission is not *returned* as executed by more than *one* out of *five* Commissioners, contrary as well to the tenor of the commission itself, as to the general principles of law in relation to *authorities*. See 1 *Bac. Abr.* 319. (*Gwill.* edit.) and the cases there cited. It might be of dangerous consequence to sanction such a return as this; which would be as properly done in the case of twenty Commissioners as of five, and thus *one* dishonourable character might abuse his trust to the injury of the parties, and in opposition to the precautions they have taken to require the concurrence of a majority. The terms of this commission, which is directed to five by name, (any three of whom are, however, empowered to act,) in using the word "*you*" and omitting to use the expression "*any of you*," are very emphatical to import, that the trust was

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confided to, and can only be executed (which includes the return) by, the whole number, or, at least, the majority thereof. If this objection had never been taken in the Court below, or even if we were now considering it upon the *first* bill of exceptions, (and no *previous* notice of the objection on the part of the appellant had been given,) I will not *determine* that the objection ought to prevail; but the case is widely different at the present time. We are now acting upon the bill of exceptions exhibited on the 15th of *April*, 1801, when the case was on trial before the *fifth* Jury. The objection in question was not then taken for the first time: it had been taken on the 1st of *April*, 1799, and on the 13th of *November*, 1800, as appears by the several bills of exceptions of those periods. On the 12th of *August*, 1800, the appellant also obtained an order for taking *Dick's* deposition, which shewed he was not satisfied with the one formerly rendered. All these facts and circumstances shew an early and constant objection, on the part of the appellant, to the deposition in question: the appellee cannot, therefore, complain of surprise, and the case now comes before us as it would in relation to a first trial, if notice that the objection would be made had been previously and formally given. The principles of law must therefore prevail; and the appellee having deliberately staked his right to recover upon this, as an abstract question, he must submit to a decision upon it accordingly.

My opinion therefore is, that the judgment of the County Court is erroneous, in having admitted the deposition in question to go to the Jury, and that the judgment of the District Court affirming it is also erroneous; that both ought to be reversed, and a new trial awarded, in which the said deposition is not to be admitted in evidence.

Judge FLEMING. The only important point in this cause is, whether the deposition of *Philip Dick*, taken in the city of *Philadelphia*, and read at the trial of the cause in the County Court, was legal evidence or not?

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The exceptions taken by the counsel of the defendant (the present appellant) were, 1st. That the commission under which the deposition was taken was directed to *five* Commissioners, any three of whom might act; and it was subscribed, and from the face thereof appeared; as he *contended*, executed by *one* only.

2dly. That it was not taken at the time and place mentioned in the notice. And, 3dly. That by no evidence other than the deposition itself, did it now appear that *William Jones* was the agent of the defendant, or had authority, either express or implied, to consent to the postponement until the 21st of *December*, 1798, and to a different place. No exception whatever has been taken by counsel with respect to the legality of the *commission*, in either of the Courts in which the cause has been discussed. But a Judge of this Court, for whose opinions I have the highest respect, seems to think that the commission itself is too defective, in *law*, to authorize the taking of any deposition in virtue of it: but, being of a different opinion, I must first refer to the act of Assembly on the subject, and then notice some of the orders that had been made in the cause, previous to the date of the commission.

The mode pointed out, by the 13th section of the act of 1792, 1 *Rev. Code*, c. 141. for taking the depositions of witnesses residing out of the state, seems, in part, superseded, in the case before us, by the appearance and consent of the parties in Court; both of whom seem to have relied on the testimony of *Philip Dick*, whose deposition is now the subject of controversy.

On the 15th of *June*, 1796, a commission was granted to the *defendant* to take the deposition of *Philip Dick*, of the city of *Philadelphia*; and *Benjamin Jones*, *William Kenner*, and three aldermen of the said city to take the same, by consent of the parties; "and the same is granted to the *plaintiff*."

That commission not having been executed, on the 11th of *July*, 1797, by consent of the parties, it was ordered,

that a commission issue to any four aldermen of the city of *Philadelphia*, and *William Kenner*, to take the deposition of *Philip Dick* of said city. It does not appear whether a commission ever issued by virtue of that order; and if one did issue, it was not executed: as on the 14th of *September*, about two months thereafter, by *consent* of the parties, an order was granted for new commissions to take depositions: from whence I infer that the parties found it convenient to change the Commissioners, whether on the death of *William Kenner*, (the only one specially named in the order of *July*,) or from any other cause, seems immaterial, as the change was made by consent of the parties. In the commission issued in consequence of the order of the 14th of *September*, and by virtue of which the deposition was taken, five Commissioners were specially named, to wit, *Reynold Keen*, alderman of the city of *Philadelphia*, *John Gibson*, *William Rogers*, *Robert Underwood*, and *David Denniston*, any three of whom to act, if the whole could not. And it appears that the four first named were present at the taking of the deposition, though certified by *Keen*, the alderman, only. I have no doubt but the commission issued conformably to the order, though no commissioners are named therein. 1st. Because I will presume that the Clerk did his duty, unless the contrary had appeared; 2dly. Because I cannot suppose the clerk, at the distance of four or five hundred miles from *Philadelphia*, where he was, probably, an utter stranger, could have so particularly inserted the names of five Commissioners, unless they had been chosen and designated by the parties themselves. And, 3dly. Had the commission not have been issued in conformity to the order, the error would not have escaped the vigilance and notice of *Mr. Sheffy*, the eagle-eyed counsel of the appellant, who seems to have availed his client of every advantage he supposed the law would allow him. I am therefore of opinion, that the commission was of sufficient validity to authorize the taking the depo-

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sition under it. I proceed to consider the exceptions taken to the deposition.

With respect to the first objection, "that the commission was directed to five Commissioners, any *three* of them to execute, and it was subscribed, and from the face thereof (as he contended) appeared executed by *one* only." This is the only point on which I had any doubt, but, on mature reflection, after carefully attending to the deposition, and the return thereof, my doubt is removed. It appears to have been taken *in the presence of four* Commissioners, (when *three* would have sufficed,) and of *Jones*, the agent of the appellant, with great attention, skill, and circumspection. After the witness had gone through his plain, simple narrative, every pertinent interrogatory that an acute attorney could have suggested seems to have been put to him; all of which he answered with apparent candour and perspicuity. The deposition itself seems one of the most unexceptionable that I ever heard read in a Court of Justice. But "*it was subscribed by one Commissioner only.*" That I take to be the usual mode of making returns on commissions of this nature, executed in *Philadelphia*: which seems to me rather a matter of form than of substance, and ought not, in my apprehension, to vitiate a deposition so unexceptionable in every other respect; and appearing to have been taken by the whole four Commissioners, who, by the commission, were directed "to cause to come before them *Philip Dick*, and him diligently examine, in solemn form, on oath, or affirmation, and having received his examination aforesaid, that they plainly send the same enclosed into our said County Court of *Wythe*." The commission did not require that the deposition should be *subscribed* by all the Commissioners: but that it should be diligently *taken* by them, and *sent* into the Court from whence the commission issued; which appears to me to have been substantially and completely done. On trials by Jury, even in cases of life and death, the verdicts are *subscribed* only by the foremen, in behalf of the other Jurors.

The second objection is, "that it was not taken at the time and place mentioned in the notice." It appears that the Commissioners met at the time and place therein mentioned; and if the appellant had not appeared, either in person, or by agent, they might have proceeded to execute the commission in his absence. He did not appear in person, and their receiving *Jones* as his agent did not place him in a worse situation than he would have been in without an agent: *Jones* (having been received as such) had a right to consent, and did consent, (probably in the absence of the *witness*,) to postpone the business for two days, and then, for greater convenience, to meet at the office of *alderman Keen*, the first named Commissioner, where the commission was executed in the manner before noticed, in the presence of *Jones*, the agent, and by the same four Commissioners.

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The *third* objection is, "that by no evidence, other than the deposition itself, did it now appear that *William Jones* was the agent of the defendant, or had authority, either express or implied, to consent to the postponement until the 21st of *December*, 1798, and to a different place." To this it may be answered, that there is evidence in the record that the appellant confessed he had appointed a certain *William Jones* his agent, to attend to the *taking of Philip Dick's deposition*; and, if he was his agent for that purpose, he had a right to consent to any thing, and every thing, relative to the business, that the appellant might have consented to, had he been personally present.

I am therefore of opinion, that the deposition was properly admitted as evidence on the trial, and that the judgment ought to be affirmed.

But, as a majority of the Court is of a different opinion, the judgment is reversed, and the cause remanded to the Superior County Court of *Wythe*, for a new trial to be had therein, on which trial the deposition of *Philip Dick*, read at the former trial, is not to go in evidence to the Jury.

Tuesday,  
May 1.

## Eppes against Crallè.

1. What degree of uncertainty and inaccuracy of language is sufficient to set aside the finding of a Jury in a mill case. **THIS** was an application for leave to raise the dam of a water grist-mill on *Flatrock* creek, in the County of *Lunenburg*.

The petition of *Richard K. Crallè*, presented to the County Court, requested permission to raise his dam "from its *present height to fourteen feet and one half*," and

2. On a petition for leave to add to the height of a mill-dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the Jury to assess such other damages, accruing from the dam already erected, as were not contemplated by the original Jury. prayed a writ of *ad quod damnum* "to ascertain what additional damages would be done, by overflowing land not condemned by the former Jury, in raising the dam *that additional height*;" without specifying what the *present height* was; neither did it mention any *other* subject of inquiry.

The Court awarded a writ of *ad quod damnum* to assess the damages that would accrue by raising the said *Crallè's* mill-dam "*six inches* higher than the *present* dam, and such *other* damages, as have accrued in raising the dam the *present height, not contemplated by the former Jury*."

The writ of *ad quod damnum* conformed to this order; except that, by an apparent mistake of the Clerk, the word "*condemned*" was used, instead of "*contemplated*." In other respects it was in the usual form.

3. But an error in this respect should be regarded as surplusage, (the petition for the writ of *ad quod damnum* having prayed only for such inquiry as the law authorizes,) if the Jury assessed such erroneous damages *separately*, and the Court did not direct the same to be paid, but only the damages properly assessed. The first writ not having been executed, in consequence of a fresh in the creek, as appeared by the Sheriff's return, an *alias* writ of *ad quod damnum* was awarded, "according to the prayer of the petition." This *second* writ directed the Jury to make the *same* inquiries with the *first*.

In obedience to this writ, a Jury "having been empanelled (only for such inquiry as the law authorizes,) if the Jury assessed such erroneous damages *separately*, and the Court did not direct the same to be paid, but only the damages properly assessed.

4. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses.

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led, charged and sworn as the law directs, *proceeded to inquire into the several matters delivered them in charge.*" Their inquisition then proceeded, "*after due consideration thereof, we are of opinion that by erecting the said Richard K. Crallé's dam six inches higher than its present height, agreeable to the annexed writ of ad quod damnum, it will damage the lands and other conveniences of Francis Eppes to the amount of fifty dollars and fifty cents, and that the lands of William Buford will be damaged to the amount of one dollar. We are further of opinion, that there has accrued damages to the land conveniences of the said Francis Eppes to the amount of one hundred and forty dollars, and that it will damage the lands of William Buford four dollars, which said last-mentioned damages was occasioned by the waters overflowing higher than the former Jury contemplated, and have been assessed by us, which we are of opinion ought to be paid by the said Richard K. Crallé to the said Francis Eppes, in addition to the damages assessed by the former Jury. We are further of opinion that no mansion house, office, garden, curtiledge or orchard will be effected or damaged by the erection of the said mill-dam six inches higher than the present dam, and that no mansion house, garden, office, orchard, curtiledge, or the ordinary navigation, or passage of fish, or the health of the neighbourhood will not be annoyed, or affected by the raising the said mill-dam to the present height, not contemplated by the former Jury, and in our opinions there will be no other damage to any person or persons whatsoever, except to the said Francis Eppes and William Buford. Certified under our hands and seals this 5th day of October, 1807.*"

On the return of this inquisition, *Francis Eppes only was summoned, to shew cause, if any he could, why an order should not be granted according to the prayer of the petitioner; and the parties appearing, the Court, "upon hearing the inquisition and other evidence adduced by the parties," was of opinion "that the said Crallé have leave to build his dam fourteen feet six inches high."* And the said

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*Crallé* tendered in Court the damages found by the Jury, which the defendant refused to accept, and appealed to the District Court of *Brunswick*, which reversed the said order, and, proceeding to make such order as the said County Court ought to have made, directed "that the said *Richard K. Crallé* have leave to raise his dam six inches higher than the present dam, and that the appellee pay to the appellant fifty dollars and fifty cents, and *William Buford* one dollar, the amount of the damages found by the Jury in their inquisition, which will be sustained by them in consequence of the appellee's raising his dam six inches higher than the present dam; and that the appellee recover against the appellant his costs expended by him in prosecuting his petition in the said County Court."

From which order the appellant prayed an appeal to this Court.

*George K. Taylor*, for the appellant, made three points; viz.

1. The petition was for leave to raise the dam "to fourteen feet and one half;" the order awarding the writ of *ad quod damnum* said "six inches higher than the present dam." This is a fatal variance; for there is nothing in the record to shew what the present height is.

2. The order made by the District Court should also be reversed for uncertainty. The County Court, notwithstanding their first order, had directed the Jury to assess the damages that would accrue by raising the dam six inches higher than at present, in their last order conformed to the petition, and granted leave "to build the dam fourteen feet six inches high." The District Court reversed that order, (which was the most correct,) and gave judgment in the language of the inquest, "to raise the dam six inches higher than the present dam;" leaving it uncertain to what height it should be raised.

3. The first order of the County Court, and the writ of *ad quod damnum* directed the Jury to ascertain the dama-

ges which a previous Jury had not foreseen and estimated; and this Jury made a return as to that fact. This inquiry the Court had no right to direct them to make, and their having made it vitiates the whole inquest.

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*Call*, for the appellee. The two first points depend on the testimony which is *now* about to be laid before the Court. The third point relates to mere *surplusage*, which ought not to have been in the order, but need not be regarded.

*Taylor*. The act of Assembly directs the attention of the Sheriff and Jury to certain points only. The Court here directed another point to be inquired into not authorized by law. Their act is therefore void. So, in the case of official bonds, if not exactly conformable to law, they are void.

*Call*. This objection never would have entered my mind; and, I must say, I never knew one of less foundation. I grant, if things *ordered* by the statute had not been done, the inquisition would have been void. But here the Court have only done a work of supererogation.

Where a *statute* directs bonds to be taken in a *prescribed form*, I admit that form must be strictly pursued. But no particular *form* is prescribed for an *inquest*. The case of a forthcoming bond is therefore similar to this. Where more than the amount of the execution is inserted in the bond, the plaintiff may release the surplus.

The additional inquiry in this case was for the benefit of *Eppes*; not of *Cralle*. The two assessments of damages may easily be *severed*; being separately found. So far, then, as the jurisdiction of the Court under the act extended, its orders should be supported; and disregarded as to the other part. Both the County and District Court *rejected* this, and merely proceeded to award the damages for *raising* the dam.

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Judge TUCKER. The party was entitled to his *action toties quoties* for injuries not estimated by the former Jury. In this case the writ of *ad quod damnum* could *legally* issue only to assess the additional damages occasioned by *raising* the dam. I am therefore of opinion, that the inquisition taken upon it was *illegal* and ought to be quashed.

Judge ROANE was of a different opinion. The party having prayed for what was perfectly legal; and the Court having corrected its own error, (for the last order was exactly conformable to the petition,) no injury was done. The maxim therefore applies "*utile per inutile non vitatur.*"

Judge FLEMING, as to *this point*, agreed with ROANE; observing, that the error committed in the first order was subsequently corrected by the Court.

*Taylor* proceeded to mention another point. The Jury have not answered to all the commands of the writ. They have not said whether fish of passage, and ordinary navigation, will be obstructed, or the health of the neighbours injured.

*Call.* The Jury, in conclusion, *negative all damages* to any person whatever. But it greatly depends on the *manner of reading* this inquisition, to determine whether it answers to the whole command of the writ.

Judge TUCKER. This inquisition is not intelligible to me; and the last clause implies there might be *other damages* (*not ascertained*) to *Eppes and Buford*.

Judge ROANE. I am for looking to *substance*; and, if satisfied that the meaning of the Jury (though not technically expressed) comes up to the requisition of the law, will be satisfied. I understand the *meaning* of the last

clause in the inquisition, though inaccurate and ungrammatical, to be that the health of the neighbours had been contemplated by the former Jury; and that no *other* damage than (as before mentioned) to *Francis Eppes* and *William Buford*, would result. They thus adopt the opinion of the former Jury, as to the health of the neighbours; and say as they did.

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Judge FLEMING considered the return of the Jury insufficient; not having answered to the essential parts of the writ of *ad quod damnum*; viz. to what related to the health of the neighbours, the passage of fish and navigation.

An order was therefore directed to be entered, *reversing both judgments; quashing the inquisition and writ of ad quod damnum*; setting aside all the proceedings subsequent to the petition; and remanding the cause to the County Court for further proceedings. But, on Judge ROANE's suggestion, the Court agreed to reconsider the subject.

Wednesday, May 2. A second argument took place.

*Call.* More precision than was used in this case is not required by the *terms* of the act of Assembly. The question is about *raising* a dam, not about an *original* order to build a mill. The inquiry is only as to the value of *additional* damages; not as to the *original* points. But, even if a larger latitude of inquiry be requisite, this inquisition is sufficient. Whether the *health* of the neighbours will be injured is a mere matter of opinion, *not conclusive*, but traversable, and amounting to no more than the oral declarations of the Jurors in Court. Evidence may therefore *now* be received as to this point.

The degree of *certainty* required in *inquisitions* is not as great as in *pleadings*. Certainty to a *common* intent is sufficient. (a) "There are three manners of certainty. 1. Certainty to a *common* intent; 2. Certainty to a *certain*

(a) 5 Co. 56.  
b. *Knight's*  
*cases*, 4 *Re-*  
*sol.* 1 *Tidd's*  
*Prac.* 136. 2  
*Salk.* 469 5  
Co. 121. a.  
*Long's case.*



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intent in general; and, 3. Certainty to every intent;" which last certainty is rejected altogether. The same certainty is not requisite where a statute is *directory* only, not prohibitory. (a) It was the duty of the Sheriff and Jury to make these inquiries; and it shall be intended that they did their duty unless the contrary appear. (b)

(a) 2 Sid.  
144.  
(b) 1 Hale's  
P. C. 416.

In England, there are two kinds of inquests. One is called an office of instruction, or information; the other an office of intittling. In the former, as much accuracy and certainty are not requisite as in the latter. In this country, the inquisition in a mill case resembles the office of instruction.

In inquisitions of this kind, whatever is well found shall stand; and a writ *melius inquirendum* shall go as to whatever is not well found. (c) Where the inquisition is totally uncertain, I admit that a *melius inquirendum* cannot issue: but the case is otherwise where it is uncertain as to part

(c) 1 Hale's  
P. C. 415. 2  
Salk. 469.

(d) Vaughan's only. (d)

Rep 341.  
(e) 2 Wash.  
126.

In *Wroe v. Harris*, (e) it was decided that where an inquisition is general, "that no man will be damaged," it is sufficient. In this case the inquisition shews, on its face, that the Jury considered every thing that the law directed: the conclusion is general, negating every subject of inquiry. Where the Jury say that the "ordinary navigation, or passage of fish, or the health of the neighbourhood, will not be annoyed or affected by the raising the said mill-dam to the present height, not contemplated by the former Jury," their meaning must certainly be to the present contemplated height, which had not been taken into consideration by the former Jury. But a sufficient answer to the objection is, that the whole case is still open to the Court upon the evidence.

*Taylor*, contra. If the inquisition find facts against the petitioner, that finding is conclusive; and such is the constant practice. Other evidence is never admitted to supply defects, but only to traverse the inquisition.

According to Mr. Call's own doctrine, if *uncertainty* appear, the inquisition must be quashed: and this is the very case at bar.

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*Wednesday, May 2.* Judge TUCKER observed that he had nothing to add to his opinion given yesterday relative to *two* points: but he would now say that the District Court erred in making the *present* height the standard, there being nothing to shew what that height was: and, if for no other cause, the judgment should be reversed for *that*. He afterwards furnished the reporters with the following *written* opinion.

My opinion, briefly, was, that there were several errors in the proceedings and judgments of *both* Courts.

I. That the writ of *ad quod damnum* was erroneous,

1st. In directing an inquiry to be made as to what damages would accrue from raising the mill dam six inches higher than the *present height*, without mentioning what the *present* height was. And,

2d. In directing the Jury also to say what other damages *have already* accrued and been done to individuals, in raising the dam to the present height, "*not condemned by the former Jury.*" The first of these matters being uncertain and indeterminate; and the latter, not within the proper objects of this Jury's inquiry, but the subject of an action, or actions, between the parties.

II. That the inquisition taken was erroneous,

1st. In answering to these erroneous matters.

2d. In not answering in what manner the ordinary navigation, the passage of fish, and the health of the neighbourhood may be obstructed or annoyed by raising the dam. And, therefore, that the said writ of *ad quod damnum* and inquisition ought to be quashed, for such uncertainty, &c.

III. That the County Court erred,

1st. In giving leave to raise the dam, instead of quashing the writ and inquisition.

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2d. In allowing the petitioner to raise his dam to the determinate height of fourteen feet six inches, without a previous inquiry into the effects which might be produced by raising the same to that particular height. There being nothing in the writ or inquisition to shew what such effects might be.

IV. That the District Court erred,

1st. In giving leave to raise the dam upon these uncertain, insufficient, and erroneous proceedings. And,

2d. In giving leave to raise the dam to the uncertain and indeterminate height of six inches above the *present* height, which *present* height does not appear from any part of the proceedings.

Judge ROANE was of opinion that the order of the District Court should be affirmed. He thought the return to the writ of *ad quod damnum* substantially good. It appeared also sufficiently from the proceedings that the *present* height of the dam was *fourteen* feet; and that granting leave to raise it to *fourteen feet six inches*, (according to the *petition*,) or *six inches above its present height*, (according to the order awarding the writ of *ad quod damnum*,) was, in fact, the same thing.

Judge FLEMING. I have examined the cases cited yesterday by Mr. Call, and cannot perceive their application to the case now before the Court. He properly observed that there were in *England* two kinds of inquisitions, where the crown is concerned—one of *instruction*, or *information*, and the other of *intitling*; and, if there be any analogy between *them* and the one before us, *this* is analogous to the office of *intitling*; which, his own authorities say, requires *accurate* certainty.

The writ of *ad quod damnum*, in the present case, (omitting what has been *adjudged surplusage*,) required the Jury to meet on the land of *Richard K. Cralle*, where he has erected his water grist-mill, and examine the lands above

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and below, of the property of others, which may be probably overflowed by raising the said *Crallé's* mill dam six inches higher than the present dam, and say what damage it will be to the several proprietors; and to say whether the mansion house of any such proprietor, or the offices, curtilage or garden, thereunto immediately belonging, or orchards, will be overflowed; to inquire whether, and in what degree, *fish of passage*, and *ordinary navigation*, will be obstructed; and whether, in their opinion, the *health of the neighbourhood* will be annoyed, by the stagnation of the waters?

The Jury, after taking notice of their charge, proceed to say, "We are of opinion that the erecting the said *Richard K. Crallé's* dam six inches higher than the present height, agreeable to the annexed writ of *ad quod damnum*, it will damage the lands and other conveniences of *Francis Eppes* to the amount of 50 dollars and 50 cents; and that the lands of *William Buford* will be damaged to the amount of one dollar." And (omitting here what they say respecting damages, and inconveniences, not contemplated by the former Jury, as irrelative to the point under consideration) they proceed to say, "We are further of opinion that no mansion house, office, garden, curtilage, or orchard, will be affected or damaged by the erection of the said mill dam six inches higher than the present dam, and, in our opinion, there will be no other damages to any person or persons whatsoever, except to the said *Francis Eppes* and *William Buford*;" implying, however, that there may be other damages to those two persons: but the great defect seems to be, that they are quite silent, and have made no particular answer, respecting the *passage of fish*, the *obstruction of navigation*, nor the *annoyance of the health of the neighbourhood*, in consequence of the dam being raised six inches; which was given them in charge by the said writ.

But *Mr. Call* argued that the general finding of the Jury, that, "in their opinion, there will be no other damages to

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any other person or persons whatsoever, except to the said *Francis Eppes and William Buford,*" comprehended those three latter subjects of inquiry, and rendered any special finding, with respect to them, unnecessary.

As well might he have argued that a general finding, that no damage nor inconvenience would accrue to any person or persons whatsoever, in consequence of raising the said dam *six inches* higher than the present dam, (without specifying a single subject of inquiry,) would have been a sufficient compliance with, and execution of, the said writ.

But the counsel further observed, that, by the fifth section of the act concerning mills, other evidence than the inquest might, and ought to be resorted to. True; but for what purpose? not to *aid* the inquest but to *contradict* it; and to prevent the Court giving leave to build, or raise, a mill dam, if it should appear to the Court, from such other evidence, that the Jury had been mistaken on any one subject of their inquiry. I am, upon the whole, of opinion, that the judgment of the District Court is erroneous and ought to be reversed, and the inquisition quashed.

By the *majority* of the Court, the judgments of both Courts were *reversed*; all the proceedings subsequent to the *petition* set aside; and the cause remanded to the County Court for further proceedings.\*

\* Note. In this case the mileage and attendance of a number of *witnesses*, summoned to the Court of Appeals, was ordered to be taxed in the bill of costs, and recovered by the appellant against the appellee; though no witnesses were *examined*; the Court having determined on a view of the *record only*.

Bullitt's Executors against Winstons.

Argued  
Thursday,  
March 22,  
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THE principal questions involved in this case were, first, 1. A writ of what acts amount to a legal *levying* of a writ of *fieri facias*; <sup>*fieri facias*</sup> and, secondly, what is the effect of the plaintiff's directing <sup>may be levied, without touching, or removing, the property; provided it be in the immediate power of the Sheriff, and admitted by him to have been taken to satisfy the debt.</sup> the Sheriff to postpone the sale of property taken in execution, and suffer it to remain in possession of the defendants, until a day subsequent to the return day; as against *securities*; such arrangement having taken place by an agreement between the *principal* debtor and the plaintiff, *without their concurrence*?

A motion was made, to the District Court of common law, holden at *Richmond*, on behalf of *Samuel Jordan Winston* and *Edward Winston*, to quash a writ of *fieri facias* issued the 21st of *February*, 1804, in favour of *Thomas Harrison*, and *Thomas James Bullitt*, executors of *Cuthbert Bullitt*, against *John Carter Littlepage*, and the said *Winstons*; on the ground, (set forth in the notice,) "that a former writ of *fieri facias* for the same debt, had been regularly issued and *levied* on the goods and chattels of the subscribers, who were only *securities* for the said debt, and the said property, then taken, released and dis- 2. The Sheriff's permitting the property to remain in the possession of a third person, or of the defendant, under a verbal engagement to produce it on the day of sale, does not prevent the *f. fa.* from having been *levied in contemplation of law*; the Sheriff being responsible to the plaintiff, in such case, if the property be not produced.

3. *Parol* evidence is admissible to prove that a *f. fa.* was levied, though no return was made upon it.

4. A Sheriff may be permitted, by order of Court, to make a return upon an execution, or to amend it, according to the truth of the case, at any time after the return day.

5. A plaintiff, by directing the Sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the possession of the principal defendant, or his securities, releases the securities altogether from that or any subsequent execution; such direction being given *without their concurrence*.

6. In such case, the plaintiff's adding to the direction the words "*holding the property subject to the said execution*," cannot prevent the release from operating.

7. An appeal from, or *supersedas* to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only.

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charged by the aforesaid *Thomas Harrison*, under a compromise with the said *John Carter Littlepage*; to which compromise they were not parties, or in any manner consulted with respect to the same."

The evidence introduced on the hearing of this motion, and spread upon the record by a bill of exceptions, consisted of two writs of *fiери facias* on behalf of the said executors; one of which was against *John C. Littlepage*, *Thomas Starke* and the said *Winstons*; and the other against the same persons, except *Thomas Starke*; both bearing date the 21st of *January*, 1800, and returnable the 1st of *April* following, but with no returns endorsed; also a letter from the said *Thomas Harrison* to the Sheriff of *Hanover*, dated *March* 12th, 1800, in which he directed him "to put off the sale of the property, taken by the said executions, until the first day of *August*, holding the property subject to the said executions, and to suffer it to remain in the possession of *Mr. Littlepage*, or his securities;" and other testimony proving that *William Clarke* was the deputy of *Thomas Tinsley*, Sheriff of *Hanover* County; that the said writs came to his hands as deputy aforesaid, at the time endorsed thereon; that, prior to the 12th day of *March*, 1800, he went to the house of *Edward Winston* for the purpose of levying the same on his property; that he then and there saw certain slaves belonging to the said *Edward Winston*, and declared that he "should levy" the said writs on them; that "no opposition was made" to the levying the said executions; that thereupon *Peter Crutchfield*, and the said *Edward Winston*, orally undertook to the said *Clarke*, to see that the said slaves should be forthcoming at the day of sale, and the said *Clarke* did not remove them, nor touch them, but assented to their remaining in the possession of *Edward Winston*, having taken a list of their names; that he next proceeded to the house of *David Timberlake*, who was in possession of a slave belonging to the said *S. Jordan Winston*, under hire until the end of the year 1800, and informed the said *Timberlake* that it was his purpose to

levy the said writs upon the said slave, but did not remove him, nor touch him, (the said *Timberlake* having promised that he should be forthcoming at the day of sale,) but consented that he should remain in the said *Timberlake's* hands till then; that the said *Clarke* appointed the 20th day of *March*, 1800, for the sale of the said slaves, and advertised them (without naming them) as having been seized by virtue of the said executions; that, on the said 20th day of *March*, *Timberlake* brought the slave in his possession to the place of sale; but *Clarke* (having received the aforesaid letter from *Thomas Harrison*) informed him *he might carry the slave back*; which he accordingly did; that, at the time of these transactions, *S. Jordan Winston* was absent from the County, and knew nothing of what had passed, until after his return. The said *Clarke* deposed "that he did believe, *and yet believes*, that the said letter was delivered to him by a certain *T. Starke*, but had been told by *Edward Winston* that it was delivered by himself; that he gave notice, on the said day, to *Timberlake* and *Edward Winston*, that he should attend at the same place on the first day of *August*, 1800, in order to sell the slaves according to the terms of the said letter; and did attend accordingly, but the slaves were not produced; that the execution, for the purpose of quashing which this motion was made, was levied upon the slaves aforesaid of *Edward Winston* only; that no property of *Littlepage* was seized under the former executions, and it was generally understood and believed that all his personal estate was so encumbered and covered by deed that those executions could not be levied with safety upon any part thereof; that *Harrison's* letter was obtained at the instance of *Littlepage*, on condition, that he would pay to the said *Harrison* the sum of 400*l.*, which was done, and was sufficient to discharge the aforesaid execution against *Littlepage*, *Starke*, &c.; (which, according to the endorsement upon it, had first come to the Sheriff's hands;) that *S. Jordan Winston* did not make to

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the said *Clarke* any objection to the said letter, while the said executions were in his hands; but it was not proved that he assented to the terms thereof, or that he ever was acquainted with the indulgence granted thereby, until after the execution now in question was issued; *that the said Clarke, as Deputy Sheriff, received his full commissions, on the said executions issued in the year 1800, from John C. Littlepage and the said Starke*; that the execution which issued the 21st of *January*, 1800, (on the same judgment on which the present execution is founded,) had an erasure on the back thereof;" and the said *Clarke* further deposed "that he believed that the names of the slaves were put on the back of the execution, but that the writing is now erased, except the word "*Peggy*," which he believed was the name of one of the slaves advertised by him, and which word is in his hand-writing." He also deposed that he did not know who made the said erasure.

Upon this evidence, the Court rendered judgment, that the said execution be quashed; "it appearing to the Court that the former execution *had been levied on property which had been released by consent of the plaintiff*, although the said execution was returned without any return endorsed thereon." And it was further ordered, "that *William Clarke* be permitted to make a return upon the execution levied as aforesaid, according to the truth of the case; to which judgment *Bullitt's* executors excepted; and afterwards obtained a writ of *supersedeas*, which abated, as to *Edward Winston*, by his death.\*

\* Note. In this case, a *scire facias* for revivor was issued "to the Sheriff of — County." The return was "*Executed, Henry Wills, Sheriff*;" without mentioning of what County. The Court was of opinion that this return was not sufficient; but *Botts* observing that a revivor against the representative of *Edward Winston* was unnecessary and irregular; the cause was argued, with assent of the Court, as to *Samuel Jordan Winston* only, and was permitted to abate as to *Edward Winston*. \* See 1 Salk. 319. *Pennoir v. Brace*.

*Botts*, for the plaintiffs in error. The first executions were not levied. I admit that seizing a part, in the name of the whole, is sufficient: (a) but then there must be a seizure. (b) Where a Sheriff seizes property not subject to the execution, as where he seizes the property of *B.* upon an execution against *A.* he is a trespasser. But, in this case, he could not have been charged as seizing *vi et armis*. In point of fact there was no seizure. Mere words could not make it. The bargain that the slaves should be considered as taken (when they were not) could not make it an actual seizure; neither could the plaintiffs (who were not parties to this bargain) be bound by it.

Indeed, the bargain was *illegal*; for the Sheriff was not authorized to leave the property in the defendants' possession without taking a forthcoming bond. (c)

The letter from *Harrison* fitted a case which did not exist; appearing to have been written under a mistaken impression that the *fi. fa.* had been levied. No precedent shews that a mere postponement by the plaintiff of a sale under execution will discharge the execution. The Sheriff may obtain authority from the Court to postpone his return, and, after the return day, may sell. Withdrawing an execution from the hands of the Sheriff, before it is levied, does not discharge it.

The Sheriff's *receiving commissions* was only *prima facie* evidence that the execution was levied; which evidence was rebutted by positive proof that it was not.

The plaintiff's letter did not authorize the Sheriff's discharging negroes which were not in his custody. In fact, he could not discharge them; for they were not produced. (d)

*Nicholas*, (Attorney-General,) contra. As to the first point; the negroes are proved to have been in the sight of the Sheriff: no opposition was made to his levying; and their names were set down on the back of the *fi. fa.* All the law can require is to get legal possession of the property;

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(a) 1 Lord  
Raym 725.  
Cole v. Da-  
vies.  
(b) 1 Salk.  
79. Genner v.  
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lor's N. Caro-  
lina Rep. 132.

(c) 1 Rev.  
Code, p. 299.  
s. 12.

(d) 6 Bac.  
Abr. 176.  
(Gwill. edit.)  
citing Roll.  
Abr. 893. 4  
T. R. 640.  
651. 1 Show.

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which he obtained in this case. Is there any book which says the Sheriff must *lay hands* on the property? If it was the intention of the parties that he should be considered in possession, and the property was left with the defendant only for his accommodation, the Court ought to hold the execution *levied*. The plaintiff's letter too shews that he considered it as levied. Besides, the Sheriff relied on *Crutchfield's* engagement to produce the negroes at the day of sale, and made use of him as his agent to keep them in the mean time.

The cases cited by Mr. *Botts* are not against us. 1 *Ld. Raym.* 725. is in our favour. 1 *Salk.* 79. relates to the service of a *ca. sa.*, and has, therefore, no analogy to this case; for, upon a *ca. sa.*, actual personal restraint is necessary, from the nature of the thing. But I doubt, even in that case, whether it is necessary to *touch* the body; for if the Sheriff shews his writ, and the defendant says "I am your prisoner," and goes to gaol, surely it is sufficient. (a) In the case in *Taylor's Rep.* 132. it is expressly stated that the Sheriff *did not* take the negroes into possession: what circumstances would have constituted possession are not stated; so that what amounts to a legal levying is not there decided. Some analogy exists between this question and that relative to what constitutes *larceny*; concerning which we are told, in 2 *East's Crown Law*, p. 544. that any act amounting by *reasonable intendment* to taking with felonious intent is sufficient to make it *larceny*.

Where an execution is issued and proceeded upon, it must be returned, and a subsequent execution must be founded upon it; (b) for an execution is an entire thing, and cannot be superseded without a return. (c) If, therefore, this execution was not levied, no new one could issue, the first having not been returned.

2. As to the second point; the case of *Nisbet v. Smith*, 2 *Bro. Ch. Rep.* 581. (cited 3 *Call*, 71. *Croughton v. Duval*.) is conclusive authority, that a creditor, by giving farther time to the debtor, *so as to change the nature of the contract*, discharges his *securities*.

(a) *Horner v. Battyn*, Bull. N. P. 63.  
*Blasch v. Archer*, *Cowp.* 65.

(b) 2 *Bac.* Abr. 717 719.  
(*Gwill* edit.)  
(c) 1 *Salk.* 322. *Clerk v. Withers*  
*Ld. Raym.* 1072. S. C.  
2 *Saund* 343.  
*Mildmay v. Smith*.

Wickham, on the same side. A statement in a bill of exceptions is not like a special verdict, in which the *facts* are found; but only sets forth the *evidence* of facts. This bill of exceptions contains enough to shew that the first execution *was levied*. The plaintiff is bound by the acts of the Sheriff; for he has his remedy over against him. Whatever, therefore, the Sheriff considers as equivalent to service of the execution, the plaintiff is bound to take as such; and even if he acted improperly, the execution was not the less levied. But, in fact, the Sheriff acted with propriety: he had a right to trust the property to the defendant, or any body else; for he remained himself responsible to the plaintiff. According to Mr. *Botts*, a Sheriff cannot take negroes without putting them in gaol. But the practice of the country is very properly otherwise; for a contrary practice would be the excess of cruelty. As to *S. J. Winston's* property, it was produced, on the day of sale, by the *hiree*. Whether he was obliged to do this, or not, is an important question, but not necessary to be settled in this case; for *volenti non fit injuria*.

Mr. *Botts's* argument would shew that an execution cannot be levied without *removing* the property: but there are many things which cannot be conveniently removed. For example; is the Sheriff to *take away* a stack of oats or wheat? May he not sell such articles on the premises? So the sale of furniture may be at the house of the debtor. In all such cases, if the Sheriff chooses to run the risk of leaving the property, there is nothing to prevent him; and his remedy is by action of *trover*, if he cannot otherwise get possession to make the sale. If a negro escapes, he may take him again, if he can; if not, he must bring *trover*.

I admit, postponement by the plaintiff does not discharge the *execution*; neither ought it to discharge it. True it is, the course of a prudent creditor, when he is willing to grant the defendant indulgence, generally is to tell the Sheriff he will have nothing to do with any arrangement between the defendant and him, but will not call on *him* for

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the money until a certain day. But the proposition I contend for is, that, by postponing the execution, at the instance of the *principal debtor*, the plaintiff, (though he does not thereby discharge it,) in equity exonerates the *securites*.

*Randolph*, in reply. The last execution which the Court directed to be quashed does not appear in the record; but must be presumed to have been in due form. Both the first executions are directed "to the Sheriff of — County," and are endorsed "*William Clarke, Deputy Sheriff*," without saying of *what County*. It does not appear, therefore, that they were in the hands of any legal Sheriff or authority. Of course, there was nothing to prevent the subsequent execution from lawfully issuing.

If this point be against me, I still contend the first executions were not *levied*. The levying is not proved to have been *expressly* made; for *Clarke* himself does not say this; but only that he avowed an *intention* to levy; saying not that he *did*, but that he *would*. Neither was it such a levying as operates *impliedly* in the eye of the law. What means *levying, executing and serving*, which are synonymous terms? Some act which takes the property into the custody of the law; some act, the effect of which, superadded to the *lien* by delivery to the Sheriff, insures the money to be ready on the return, or sanctions the property from *rescous*. Without one of these two circumstances, there

(a) *Taylor's*  
C. Rep.  
132. 147.

can be no levying. (a)

The cases in which the *touch* may be dispensed with in *part*, are, 1. Where the property taken consists of one homogeneous aggregate; as a heap of wheat, a library of books, and a flock of sheep; or, 2. Of dissimilar constituents of one integer; as furniture in a house; different crops, or other property in the same barn; or, perhaps, even horses, &c. in the same stable, or stacks in the same field. I admit, also, that *no touch* is necessary, where property is brought into the presence of the Sheriff, so that, from proximity, he may be said, according to the usual course of things, to

have it in his immediate power; as slaves brought into a room, or within a short distance, as usage is; not precisely measured indeed, but according to ordinary practice; or slaves going home with the Sheriff, or on their way to gaol. But this case comes within none of these classes.

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Let it be tested, by inquiring, if a person had driven off these negroes, could he have been charged with a *rescous*? He might have defended himself by saying there was no unequivocal act or declaration shewing that the Sheriff had taken them. Their being merely in his *sight* was nothing. Would the Sheriff have run the risk of being prosecuted for a false return, upon such a levying?

*Crutchfield* was not the agent, or *bailee*, of the Sheriff; for the Sheriff had not the slaves in possession, and could not therefore deliver them to him. The Sheriff's receiving *commissions*, (being an act *in pais*;) does not prove that he levied the execution, when he would not return it executed. He must have received them after the failure to deliver the slaves, and, probably, the money was paid by the defendants to quiet him. His advertising the property is also no proof of levying; for he did so, under the expectation that *Crutchfield* and *Timbertake* would produce the slaves according to promise.

The plaintiff was not bound by the act of the Sheriff, the *fi. fa.* not having been *returned levied*; but had his choice, either to bring his action against him, or to consider the first *fi. fa.* not levied, and to sue out another.

It is contended that *Jordan Winston's* slave was actually levied upon. But, before the day of sale, the Sheriff mentioned only a "*purpose*;" and, on the day, there was no indication of an actual levying; for the Sheriff contented himself with telling *Timbertake* to take him home again.

2. The property was not *released* by the plaintiffs. The terms of *Harrison's* letter (which is relied upon by the defendants themselves) prove this; a condition being expressed, of "*holding the property subject to the said executions.*" According to its own language, the practice of the

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country, and the law of the case, that letter ought not to be considered as a release.

The Court also erred in permitting the Sheriff to amend his return. It was *unnecessary*, because it furnished no additional evidence; and, as a *return, insufficient*; being long after the return-day.

One more remark is important. Even if the first execution *was* levied, it was defeated by a fraudulent compact to the injury of the plaintiffs; and therefore might be renewed. If subtle law, and metaphysical possession, be out of the way, the plain equity of the case is in our favour.

May 16, 1810. The Judges delivered their opinions.

Judge TUCKER. The first question which presents itself on the bill of exceptions filed in this case, is, whether the two writs of *feri facias* which issued from the District Court of *Richmond* the 21st day of *January*, 1800, at the suit of *Bullitt's* executors, one of which was against the goods of *John Carter Littlepage, Thomas Starke, Samuel Jordan Winston, and Edward Winston*; and the other against *J. C. Littlepage, S. J. Winston, and E. Winston*, only, and which were proved to have come to the hands of *William Clarke*, as Deputy Sheriff for *Thomas Tinsley*, Sheriff of *Hanover County*, to execute, were actually levied, or not, by the said *William Clarke*. And I am of opinion, that the evidence is sufficient to prove that they were. [Here Judge TUCKER recited the evidence relative to the levying; in substance as above stated.]

The simple question upon this evidence is, whether it be sufficient to prove that the execution was levied? When the Sheriff had declared his intention to levy the execution on the slaves in his view; when no opposition was made to his levying the execution on those slaves; (whether near, or at a distance does not appear, and therefore I shall presume they were in his presence;) when he *had taken a list of their names*, (as the law requires in such cases,) which he proba-

bly must have been informed of by their master *Edward Winston*, then present; and when *Winston* and *Peter Crutchfield* (whose undertaking is out of the question, at present, as both executions were endorsed, "no security to be taken") had undertaken to produce the slaves on the day of sale; can there be a doubt that it was unnecessary to touch them, in order to give effect to the levy? The Sheriff acted at his own peril, in leaving the slaves behind him, it is true; but there is nothing in law, nor in reason, to prohibit him from doing so, if, from his knowledge of the party in whose possession they are taken, he has sufficient confidence to intrust him with the care of them till the day of sale. The inconvenience, and, in many instances, the cruelty, of a contrary practice need not be dilated upon. The same may be said of the slave in the possession of *Timberlake*; as he did not oppose the levying of the execution, notwithstanding his possession of the slave, and his interest therein to the end of the year, no other person had a right to dispute it. He produced the slave on the day of sale, which is an additional proof that he admitted that the execution had been duly levied. We are not here to inquire how the Sheriff ought to have proceeded after this; suffice it to say, that, it being uncertain whether the property so taken (for neither the number, nor the names of the slaves now appear, although the Sheriff deposed that he believes the names of the slaves were put on the back of the execution, but that the writing is now erased, except the name of one) was or was not sufficient to satisfy the amount of the executions; and it appearing from *Clarke's* own evidence that he did not levy them on any property belonging to *Littlepage*, and it being uncertain (as not being mentioned) whether any property of *Starke*, the fourth defendant named in one of the executions, was taken, or not, the presumption, until the contrary be shewn, is, that the slaves of *Edward Winston*, on which the execution was levied, together with that of *Jordan Winston*, on which it was levied, were sufficient to satisfy both those executions. The

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Court, I think, decided rightly in ordering, that *William Clarke*, a former Deputy Sheriff of *Hanover*, be permitted to make a return upon those executions, according to the truth of the case: and, until the return was so made; or if, upon that return, it should appear that the property taken was sufficient to satisfy those executions, I think the latter execution ought to have been superseded, if still in the hands of the Sheriff, or quashed, if returned to the office. As we have no copy of that execution in the record, I cannot give a more precise opinion upon the point. In the case of *Eckhols v. Graham*, this Court is reported to have decided that, by taking out a second execution, the plaintiff had waived the benefit of the first, and discharged the lien upon the slaves taken upon it. (a) But I think that case does not apply to the present; for, until a return made upon those executions, it does not *legally* appear whether the property taken hath been sold, or whether it was sufficient to satisfy the whole, or only a part of those executions.

(a) 1 Call, 404.

The second question is, whether the letter from *Thomas Harrison*, one of *Bullitt's* executors, directed to the Sheriff of *Hanover*, dated *March 12, 1800*, wherein he desires to put off the sale of the property taken in execution to the 1st day of *August*, holding the property subject to the said executions, and to suffer it to remain in the hands of *Littlepage* or his securities, was a release of the property so taken as to *Jordan Winston*, who is expressly stated to have known nothing of the transaction, or to have acquiesced in the indulgence granted by *Harrison*; until after the third execution was issued. Now, certainly, from the very terms of the letter, it appears that *Harrison* never had any intention to release the property; for he directs the Sheriff to hold the property subject to the executions. The Sheriff, therefore, was not authorized to do any thing more than to postpone the sale, leaving the slaves, where they were, in the possession of *Littlepage* or his securities. But how was this to be done? Not by the Sheriff, *virtute officii*, because the endorsement on the executions prohibited him,

as *Sheriff*, from taking any security. Having levied the executions, he was bound at his own peril, that the slaves should be sold; he encountered that peril when he left the slaves in the hands of *Edward Winston* and *Timberlake*, on their promise to produce them on the day of sale. When *Timberlake* brought *Jordan Winston's* slave, according to his promise, to be sold, he had fulfilled his promise: the slave was CONSTRUCTIVELY, at least, in the Sheriff's possession; and he was bound for his safe keeping until sold.

The person for whose benefit the executions issued, authorized him to suffer the slave to remain in the hands of *Littlepage*, or his securities; yet bids him hold them subject to the executions. Under the circumstances of this case he could not do this, as *Sheriff*. If the Sheriff, in pursuance of this order, suffered the slaves to return with the privity or consent of *Jordan Winston*, he acted in this instance as the plaintiff's private agent, and not as an officer. The case is still stronger if he did so without the privity or consent of *Jordan Winston*. From that moment the slave was no longer in the custody of the Sheriff, as an officer, nor could he be retaken by him at any time, as he might have been if he had not been produced to be sold; for *Timberlake* was his bailee, until the day of sale, and he might have seized the slave, and put him in prison, or delivered him to the safe keeping of any other person, until that time. But in permitting the slave to return with *Timberlake*, he acted only as the private agent of *Harrison*. It would have been otherwise if the sale had been necessarily put off, for want of buyers; for in that case, the slave would still have remained in his custody. But here the case was different: the plaintiff grants an indulgence to one defendant, at the possible loss, or injury of another.

Suppose the slave had died, or had run away, before the 1st of *August*: if the postponement was without his owner's consent or privity, ought he to be chargeable a second time for the value of what the slave would have sold for if

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the indulgence had not been given to the principal defendants? It seems then to me, that this indulgence granted to *Carter Littlepage*, the principal debtor, without the consent or privity of *Jordan Winston*, (for I mean to say nothing as to the other defendants,) amounted to a release as to him; the property once taken upon the execution being, by the act and consent of the plaintiff, put out of the custody of law, in which it had before been.

But, if it be otherwise, a third question still remains. Is there not evidence upon this record, sufficient in law, to shew that the executions have been fully discharged. *Clarke*, the Sheriff, who levied these executions, swears, "That he as *Deputy Sheriff* received his full COMMISSION on the said executions issued in the year 1800, from *J. C. Littlepage*, and the said *Starke*." Now the fee bill (a) allows to the Sheriff for proceeding to sell on any execution on behalf of the Commonwealth, or of any individual, if the property be ACTUALLY SOLD, or the DEBT PAID, the commission of five per cent., &c. and NO OTHER COMMISSION, FEE, OR REWARD, shall be allowed upon ANY EXECUTION, except for the expense of removing and keeping the property taken. (b) The Sheriff being thus prohibited from receiving any commission unless the property be actually sold, or the debt paid, and having acknowledged that he has received his full commissions on both executions, the conclusion in law is, that they have been fully satisfied. And of this conclusion the defendant *Jordan Winston*, for the reasons before mentioned, is entitled to avail himself, as he hath done in the present instance. I am therefore of opinion, that the judgment of the District Court, so far as relates, to him ought to be affirmed.

As to the blank in the execution, for the name of the County; that may be amended by the Sheriff, pursuant to the order of the Court. His testimony sufficiently proves that it came to his hands as Deputy Sheriff of *Hanover*, and he may be compelled to amend his return accordingly.

(a) 1 Rev.  
Code, c. 95.  
s. 8.

(b) Ibid. c. 151.  
s. 33. accord-  
ant.

Judge ROANE. I shall not waste time to prove, that the facts stated in the bill of exceptions amounted to a complete levying of the execution of *January 21st, 1800*, and was so considered by all parties. Being so levied, the Sheriff took the personal engagement of the parties, to produce the property on the day appointed for the sale, viz. *20th March, 1800*; on which day one of the slaves was produced; and the others were not produced, probably from a knowledge existing in the neighbourhood, that the sale of the same had been postponed, by the consent of the plaintiffs. The letter, under which the sale on that day was dispensed with, was written without the privity or consent of the appellees; and the releasement of the property purported thereby, was founded on a consideration flowing from the principal debtor, *Littlepage*, to the plaintiffs. That letter either operated a complete *discharge* of the property from the execution, or, at least, by holding the property still subject thereto, precluded any further execution until it was finally disposed of. Considered in either point of view, the truth of the case ought to have been returned, at the day, by the Sheriff; which, had it been done, would have prevented the Clerk from issuing a new execution. The most favourable point of view for the appellants is, to consider the first execution as not discharged, but as *continuing*: in that view, there was no necessity for issuing the second. The law does not permit our citizens to be harassed by repeated and unnecessary executions.

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The case of *Baird v. Rice*(a) is a complete authority for (a) 1 Call, 18. the defendants, both as to the propriety of suffering a Sheriff to amend his return according to the truth of the case, and as to the effect (in favour of the security) of a *restoration* of the property by the Sheriff, to the defendant, with the consent of the plaintiff. Indeed, it is a complete authority in the present case, in which it is unimportant to the success of the appellees, whether the first execution be considered as discharged, or continuing: it is the rather an authority, because in that case there was some evidence that

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the security, *Rice*, acquiesced in the arrangement for the discharge of the property, whereas, nothing of the kind is shewn in the case before us.

I think this a very plain case, and that the judgment of the District Court quashing the second execution, should be affirmed.

Judge FLEMING concurred.

The judgment was therefore unanimously AFFIRMED.\*

\* *Note.* Some doubts, at first, existed, in this case, whether, as the second execution was not levied on the property of Samuel Jordan Winston, (the only appellee before the Court,) it was competent for him to move to quash it. But it was resolved by the Court, that he had such an interest in the question as enabled him to move to quash the execution.



Wednesday,  
April 18.

### Bradley against Welch.

1. A plea *in abatement* IN an action of debt, instituted by *Thomas Bradley* against *James Welch*, in the District Court of *Fredericksburg*, the writ issued *December 12th*, 1799, with an endorsement thereon "that bail was required." The Serjeant of the town returned it "Executed, and *Thomas R. Rootes*, appearance bail." At Rules in the Clerk's office,

*May 16th*, 1800, declaration was filed in the usual form, on a promissory note; and the defendant at the same time "by his attorney offered a plea, *on oath*, stating, that he is a resident of the County of *Greenbriar*, in the District of the *Sweetsprings*, and has resided there for five or six years; and that his only and known residence is in the said County and District; and that he never did reside in the County of *Spottsylvania*, or in the District of *Fredericksburg*, nor was the security entered into within the said District of *Fredericksburg*; and this he is ready to verify; wherefore he prays judgment of the said writ, and prays the same may be quashed."

The plaintiff's counsel rejected this plea, and the Clerk submitted the question to the Court, whether it ought to be received, without first filing *special bail*.

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The cause having been from time to time continued until the 14th *October*, 1802, the Court on that day decided "that the Clerk has no discretion; but, where appearance bail is required, the defendant *cannot appear* at the Rules, without first putting in special bail; and therefore the plea was rightly rejected." At the ensuing Rules, the defendant failing to file special bail, a conditional judgment was entered against him. At the Court held for the said District, *May* 16th, 1803, *Thomas R. Rootes*, the appearance bail, undertook as special bail, and again offered the same plea which had formerly been rejected. The counsel for the plaintiff again objected; but the Court (as appears from a bill of exceptions signed by the Judge) "being informed by the Clerk that the delay in this case had proceeded from some misunderstanding between the plaintiff's counsel and himself, respecting the course which ought to have been taken at the Rules, and not from any default on the part of the defendant, were of opinion that this cause should be considered as standing on the same ground as if the writ had been returnable to the last term, and therefore admitted the defendant to file his said plea, leaving it to the plaintiff to demur thereto, if he thinks proper." Whereupon, the judgment obtained in the office was set aside, and the cause sent to the Rules; where, in *August*, 1803, the plaintiff filed a general demurrer to the plea, and issue in law was joined; upon which the Court, at *August* term, 1804, gave judgment for the defendant; and the plaintiff appealed.

*Williams*, for the appellant. The Court erred in receiving a plea in abatement to set aside an office judgment: for, even after *imparlance*, it is too late to exhibit such plea. (a) According to the act of Assembly which limits the jurisdiction of the District Courts, (b) the proper time to have taken advantage of the objection was at the "*first calling*" of the cause, which was at the first Rules after the return of the writ. The proper mode of objecting to the jurisdiction

(a) 1 Bac. 2.  
1 Stra. 532.  
*Curwen v.*  
*Fletcher.* 1  
*Lev.* 89. 1  
*Wash.* 153.  
*Williams and*  
*Roy, Ex'rs of*  
*Corrie, v.*  
*Campbell.* 3  
*Tuck. Bl. Ap-*  
*pendix,* 50, 51.  
(b) 1 Rev.  
Code, p. 77. s.  
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is by *plea*, that the plaintiff may have an opportunity to reply, that a writ had issued against the defendant in his own District, and been returned "*non est inventus*." But the plea could not be filed without special bail, which the defendant failed to give.

The Court's admitting it, on the ground of some misunderstanding between the Clerk and the plaintiff's counsel, cannot cure the defect; for the defendant had been guilty of default long before.

2. This plea was bad upon *general* demurrer. It should have been pleaded in *propria persona*, (a) and not by attorney, without *special* leave of the Court, (b)

(a) 1 Bac. 2.  
(b) 1 Vent.  
183. 2 Keb.  
143 pl 16.  
Lutw. 22.

Thursday, May 10. The Judges pronounced their opinions.

Judge ROANE. The question in this case is, whether the District Court rightly received the plea in question, on setting aside an office judgment. It is a plea, stating that the defendant was a resident of another District, and that the debt sued for was not contracted in the District in which the action was brought: it is also sworn to. It is, therefore, emphatically, a plea in abatement, and was so admitted to be by the defendant himself, by his having sworn to it: it is merely dilatory, and does not go at all to the justice of the demand. I have no hesitation to say, that a plea of this character is inadmissible on setting aside an office judgment, under the provisions of our act of Assembly upon that subject. My reasons for this opinion were given

(c) 2 Call, 49. at large in the case of *Hunt v. Wilkinson*, (c) and I shall not repeat them. Although that opinion was in conflict with that of a majority of the Judges, in relation to the case then before the Court, nothing then said by the Court, or by the majority of the Judges, went the length of affirming, that pleas in abatement of *every* description, were admissible on setting aside an office judgment, or pleas of the particular character of the one now before us. In that case, the matter

pleaded happened *after* the office judgment was rendered ; and on that ground the opinions of most of the Judges was predicated, and, *perhaps*, from the necessity of the case, may stand justified. That decision, however, is no authority in this case, where the matter of abatement was *coeval* (at least) with the institution of the suit, and the plea stating *that* matter, was actually sworn to within three days after the emanation of the writ. I am therefore of opinion, that the District Court erred in receiving this plea, and that the judgment should be reversed, and the cause remanded for farther proceedings.

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Judge FLEMING, (after stating the case.) It seems to me that the plea in abatement was improperly admitted on setting aside the office judgment, which, by the 28th section of the District Court Law, could only be done on the defendant's pleading *to issue* immediately.

The case of *Hunt v. Wilkinson* differs essentially from the one before us. That was a plea *puis darrein continuance*, the cause of which arose after the office judgment had been entered, to wit, the appearance of the will, and new administration granted with the will annexed.

Judgment reversed ; proceedings subsequent to the entry of judgment in the Clerk's office set aside ; and cause remanded for farther proceedings.

(P) Judge TUCKER did not sit in this cause, having signed the bill of exceptions in the District Court. He did it to settle the practice which had been different from the present decision of this Court ; and expressed his entire concurrence with the decision.



Wednesday,  
May 2.

Brown and Boisseau against May

1. On a joint plea of "not guilty," in trespass *vi et armis* against two defendants, for breaking the plaintiff's close and beating his slaves, the defendants ought not to be permitted to give in evidence, by way of mitigation of damages, a license from the plaintiff to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly; the battery being committed by the other defendant; and no proof appearing that the slaves who were beaten had acted improperly.

2. Illegal, or improper evidence ought never to be confided to the Jury, however unimportant it may be to the cause.

MAY brought an action of trespass *vi et armis*, in the Petersburg District Court, against the appellants, for breaking and entering his close, and beating several of his slaves in the declaration named, "so that he was deprived of their service for a long time; and *throwing down his enclosures* 'round his field, whereby his wheat then and there growing was trodden down and injured by a great number of cattle and horses belonging to divers people; and for other wrongs, injuries, and enormities," &c. The defendants pleaded "not guilty," jointly. A bill of exceptions states that, on the trial, the defendants offered, *in mitigation of damages*, "the testimony of a witness *tending to prove* that the plaintiff *had given* a general permission to Brown, one of the defendants, *to visit his negro quarters, and to chastise any of his slaves who might be found acting improperly*; but the Court declared such testimony improper on the plea of "not guilty," and would not permit the same to be given, although the beating by the defendant Boisseau was in the presence, and with the assent, of the other defendant Brown; since both the defendants had joined in the same plea, and the act of beating the plaintiff's slaves, in the declaration charged, had been committed by the defendant Boisseau, *to whom, it was admitted by the defendants, no such permission had been given.*" Verdict and judgment for 150 dollars damages.

George K. Taylor, for the appellants. Authorities declare that, on the general issue, special matter shall not be given in evidence: but what do they mean? Not that the particular circumstances attending each case may not be laid before the Jury in *mitigation* of damages: for the plaintiff may lay before them what amounts to an *aggrava-*

tion of injury, provided such aggravation does not itself furnish a cause of action, in which case it ought to be stated in the declaration. And, therefore, he is always allowed to prove his own peaceable demeanour, his endeavour to avoid altercation, and his retreat from combat, on the one hand, and the defendant's abuse on the other. For the purposes of equal justice, then, the *defendant* ought to be, and always is, permitted to prove, in *mitigation*, under the plea of "not guilty," every thing which is not a justification of his conduct, and a legal bar to the plaintiff's recovery : but such justification or legal bar must be specially pleaded.(a) If the circumstances, though very mitigating, will not, as the defendant knows, *justify* his conduct, is not the Jury to hear what may excuse it in a great degree? If not, law is not founded on justice. But this is the law.(b)

This distinction being understood, let us see whether the facts stated in the bill of exceptions amount to a *justification* of the defendants, or either of them. They endeavour to prove that *May* had given a license to one of them to visit his negro quarters, and chastise any of his negroes who might be found acting improperly. But this permission was to that defendant alone, and could not be by him transferred to another.(c) Suppose, then, both defendants had attempted to plead it; the plea would clearly have been bad as to *Boisseau*; and, if *two* join in a plea, and it be bad for one, it is bad for both.(d) If *Brown* alone had filed such a plea, still it might have been demurred to; because, although good as to one part of his defence, (the going on the land,) it was bad as to another, (*Boisseau's* beating the slaves,) and, unless the plea be good throughout, it will not stand.(e) And there is no obligation on a party to plead what he knows to be false, or that he cannot sustain. On the contrary, every plea should be true; "for truth (saith *Hobart*) is the goodness and virtue of pleading, as *certainty* is the grace and beauty of it."(f) Suppose *Brown* had only pleaded the license to go to the negro quarters, and had not pleaded as to the battery of the negroes

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(a) 5 Bac.  
(Gwill edit.)  
tit. Pleas, letter (G) p. 370.  
2 Term Rep.  
166. Bennett  
v. Allcott. 2  
Bos. & Pull.  
924. Watson  
v. Christie.  
(b) Co Litt.  
283. 12 Vin.  
159. pl. 13. 16.

(c) 1 Bac.  
(Gwill edit.)  
tit. Authority,  
letter (D.) p.  
320.

(d) 1 Saund.  
28. note 2.

(e) Ibid. note  
3.

(f) Hobart,  
295.

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(a) 1 Chitty,  
509.  
(b) *Ib.* 516,  
517 referring  
to *Huc. tit.*  
*Trespass*, let-  
ter (l.)

at all; judgment would, as to the battery, have been signed against him by *nil dicit*; (a) for, in pleading matters in excuse, all the circumstances should be shewn. (b) But, as, where *Brown, Boisseau* and the *negroes* were the only *dramatis personæ*, to prove their improper conduct was impossible; the effort was merely to prove the *license*, and not that the slaves were *acting improperly*. This, then, was only a matter in mitigation of damages, which could not be pleaded, and, if not admitted to be given in evidence on the general issue, could not have been used at all.\*

*Hay*, for the appellee, did not think it necessary to object to most of the propositions made by the counsel on the other side. Admitting them all to be correct, they cannot avail him *in this case*. The evidence attempted to be introduced in mitigation of damages, could not have that effect; for it is not inserted in the bill of exceptions that the slaves were, *at the time of the chastisement, acting improperly*. Without that important circumstance, to shew the license properly pursued, it was, *in itself*, totally immaterial and irrelevant to the cause, and therefore not admissible. (c) Indeed, the circumstance of *Brown's* availing himself of *May's* permission, and acting under *colour* of authority, is rather an aggravation of the atrocity of his conduct, by the additional guilt of a *breach of trust*; besides, though his entry was lawful, he became a trespasser *ab initio*, by exceeding his powers.

(c) 1 *Cranch*,  
132. *Turner*  
v. *Fendall*.

Judge TUCKER suggested a question, whether the evidence should not have been received to *mitigate the damages for breaking the close*, by shewing the *entry* was not illegal?

\* *Note.* In *Ballard v. Leavell*, (MS. Nov. 1805,) in this Court, the case was trespass for taking a slave from the plaintiff's possession: on the general issue, the defendant offered evidence (in mitigation of damages) that the slave was his own: the District Court refused to admit it; but the Court of Appeals reversed the judgment, with instructions to admit the evidence.

*Hay.* Perhaps, if the defendants had claimed the benefit of the evidence in that *limited* and *restricted* way, it might have been received; but, in the *enlarged* manner in which it was offered, as applying both to the breaking the close and battery of the negroes, the Court were right in rejecting it. As in the case of *Buster v. Wallace*,<sup>(a)</sup> they were not bound to direct the jury to apply it *restrictively*.

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(a) 4 H. & M.  
82.

*Taylor, in reply.* Mr. *Hay* appears to admit all my doctrine, but says the evidence was *immaterial*, and if received, ought not to have had any effect on the Jury. But of this the Jury had the right to judge. The naked case of going on a plantation and beating slaves, without *any* authority, is materially different from one where there was *an authority*, and that authority merely *irregularly exercised*. I admit, where evidence is totally *irrelevant*, it should be rejected; but the case is very different here.

May 2, 1810. The Judges delivered their opinions.

Judge TUCKER, (after stating the case.) I admit, with Mr. *Taylor*, that this action being brought against two persons, and the evidence offered tending only to prove a permission to one of them to visit the plaintiff's negro quarters, that matter could not be pleaded as a justification of the entry of *both* the defendants. I admit also, that it is an invariable rule, that every *defence*, which cannot be specially pleaded, may be given in evidence upon the general issue at the trial.<sup>(b)</sup> But I hold it to be a rule of law no less certain, "that illegal or improper evidence (*however unimportant* it may be to the cause) *ought never to be considered to the Jury*; for, if it should have an influence upon their minds, it will mislead them; and, if it should have none, it is useless, and may at least produce perplexity."<sup>(c)</sup> The trespass charged in the declaration, is, 1st. For breaking and entering his close; 2dly. For beating his slaves; and, 3dly. For throwing down his fences around his wheat

(b) 3 Bl. Com.  
305. Bull. N.  
P. 298, 299.

(c) Per Pen-  
dleton, Pres't.  
2 Wash 281.  
Lee v. Tapp-  
cott.

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field, whereby his crop of wheat was trodden down and injured, by other persons' cattle and horses. If the charge had been only for breaking and entering his close, and beating his slaves, and the evidence had been that *HE to whom the permission was given* to visit the negro quarters, and to chastise any of the slaves who might be *found acting improperly, had ALONE beaten any of them*, and that the other defendant stood by without molesting any of them, the evidence offered might have been admitted in mitigation of damages, for the *bare entry* upon the plaintiff's plantation, but not for the beating of the slaves. Because the permission did not extend to *beating them* unless they were *found acting improperly*: now it is *not stated* that they *were found acting improperly*; consequently, even *Brown* had no right to beat them; nor could it be a matter in mitigation of damages, for *beating them if not found acting improperly*, that *HE* had permission to *chastise them*, (a word always to be understood in a milder sense,) *if found acting improperly*. The evidence therefore would have been inadmissible, if *Brown* had been the party who took upon him to beat the slaves. But the bill of exceptions gives us to understand that the proof was that *Boisseau*, and *not Brown*, was the person who beat them. The permission given to *Brown* could, therefore, form no possible excuse for the conduct of *Boisseau*; nor for *Brown*, who, by standing by, and *assenting* to the beating by *Boisseau*, made himself *particeps criminis* with *Boisseau*. The evidence, therefore, was, I conceive, totally inadmissible, even upon this view of the subject. But the declaration charges a further wilful and violent trespass, in throwing down the plaintiff's fences, and exposing his wheat to be injured by the neighbours' cattle and horses. Could a permission peaceably to visit the negro quarters, and to chastise slaves found to be acting improperly, serve as an apology, or extenuation of this sort of damage? Surely not. The evidence, if admitted to go to the Jury, might have had the effect pointed out by Judge *Pendleton*, and

was, therefore, in my opinion, most properly rejected. I am of opinion that the judgment be affirmed.

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Judge ROANE could see no error in the judgment.

Judge FLEMING was of the same opinion. The evidence had been very properly rejected.

Judgment *unanimously* AFFIRMED.



Depew against Howard and Wife.

Thursday,  
April 19.

JACOB DEPEW brought a suit in Chancery in the County Court of Botetourt, against John Howard, and Mary his wife, George Lemmon and Benjamin Howard, to set aside a patent granted to John Howard for 215 or 250 acres of land on the waters of Glade Creek, in the said County, so far as the same comprehended fifty acres of land, for which the complainant had also obtained a patent subsequent in date to Howard's patent, but founded upon an entry prior to Howard's entry.

1. In cases in which the regular remedy is by caveat, a Court of Equity may entertain jurisdiction, under circumstances which render its interposition just and proper, but such circumstances must be made to appear to the satisfaction of the Court.

The grounds of equity stated in the bill are, that the defendants had notice of the plaintiff's prior entry, and that their location calls specially for these fifty acres; that Howard's survey was never actually made; that, the plaintiff being kept ignorant of it, a patent, prior in date to his, was fraudulently issued thereon; that he entered a caveat, (but in what Court he does not say,) which was dismissed "either because he could not attend to it, the small pox being then at the Court-house, or because the Howards resided out of the State, so that no summons could be served on them."

2 A legal title to land ought not to be disturbed in favour of a party not having a superior right in equity to the identical land in question.

The defendant John Howard, in his answer, declares that his wife, in his absence, in 1778, or 1779, purchased

3. Quere, whether an entry for a certain number of acres "on the waters of Glade Creek, joining the lines of J. H.'s land,

and the locator's own land on W.'s run," be sufficiently certain

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the land in dispute of one *Thomas Welch*, who had then resided on it several years, for a valuable consideration paid out of his the defendant's property; that he was in peaceable possession of the said place until he came last to *Kentucky*, in the year 1789, which was subsequent to the location under which the complainant claims. *Mary Howard*, by whom the entry complained of was made, (in the absence of her husband it appears,) swears, in a separate answer, that *Depew* never made his claim known to her; but that, being informed he intended to enter for the place called *Welch's*, and, thereupon, dreading lest there might be some defect in *Welch's* title, she went immediately to the Surveyor's office and examined whether *Depew* had made an entry to include *Welch's* place, and found none; that she got the Surveyor to examine his entry book, which he did particularly, and told her there was no such entry; upon which she made her location to include it. This entry was made by her October 9, 1788, and *Depew's* on the 30th of September preceding; but, "from the objects of description in the location, neither she nor the Surveyor thought it was intended to cover the place known by the name of *Welch's*."

*John Depew's* entry, under which his son *Jacob Depew* claimed, was by virtue of a land-office treasury warrant of 17,854 acres, for "fifty acres of land on the waters of *Glade Creek*, joining the lines of the land of *John Howard*, and his own land on *Welch's* run."

*Mary Howard's* entry, by virtue of a land-office treasury warrant of 500 acres, was for "250 acres of land on the waters of *Glade Creek*, joining the lines of the land she lives on and *William Francis's* land and *James Goodman*, to include an old survey known by the name of *Welch's* place, and a new survey joining said *Francis*, and the one she lives on."

The answer of *Benjamin Howard*, by whose agency, as attorney for *John Howard*, the surveys were completed, states that he employed the surveyor to make the surveys, but was not present when they were made, being called on

business down the country, and having intrusted the surveyor to survey the entries *regularly*. George Lemmon (a purchaser from the defendants) admitted his being in possession of about 120 or 130 acres of land for which he had not received a conveyance. All the defendants positively denied all fraud and combination.

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Another entry made by Mrs. Howard, on the 14th of March, 1782, being for "500 acres of land joining her own land, and the land of John and Hugh Mills, and to extend to the mountain for quantity," was mentioned in the bill and answers, but does not seem to have been relied upon by the defendants.

The decree of the County Court was, "that the patent or patents that had issued for the defendants, so far as they interfere with the lands of the complainant, be annulled."

The Superior Court of Chancery for the Staunton District "being of opinion that Depew's entry was too vague, and that the appellants (having the *legal* title) ought not to be compelled to relinquish it to one who has *not greater equity*," reversed the said decree, and dismissed the bill; whereupon Depew appealed to this Court.

Hay, for the appellant. The entry of Mrs. Howard in 1782, had no relation to the land now in question; neither, in fact, did she rely upon it, as appears by her making the subsequent entry, which expressly calls for Welch's place. The only question, therefore, is, whether Depew's entry was sufficient; for, if so, her entry in 1788, being made nine days after his, was void, since it evidently comprehended the right of another person.<sup>(a)</sup> In *Hunter v. Hall*, 1 *Rev. Code*, p. 344. <sup>(a) 1. 1.</sup> *Call*, 209. it is said that, without a previous survey, no person can *strictly* conform to the terms of the act of 1779, in making a location; but that that act "unavoidably requires, and has uniformly received, a *liberal* construction in this respect." Where an entry is made in a waste country, with no patent lines to refer to, it is reasonable to require the locator to specify his beginning and courses as nearly as



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possible: but, where there is much patented land, a general reference to lines already ascertained ought to be sufficient. Indeed, if the person locating undertakes to *specify* the lines he probably might conflict with some older patented lands.

But, admitting the *first* entry *vague*, does it necessarily follow that the *second* (though *precise*) shall *avoid* the first *in toto*? It would be more reasonable (and I think it has been so decided) to give the second locator his choice, leaving enough for the first. Thus justice would be done to both parties, in case land enough for both could be found.

*Wickham*, contra. 1. Every objection to the entry of Mrs. *Howard*, in 1782, on account of *vagueness*, applies equally to that of *Depew*; and her's is the superior equity. The conduct of *Depew* is entitled to no favour. He evidently appears to have meditated an unwarrantable advantage over the appellee. The objection that her survey comprehends the right of another has no application. It does not appear to be the fact; and the law<sup>(a)</sup> applies to cases only where it evidently appears on the face of the plat or certificate of survey. Admit that the *letter* of the act of 1779 is not to be insisted on; that *mathematical* certainty in making an entry is not requisite; yet surely a *reasonable* certainty is necessary, to prevent great injury to the Commonwealth and to individuals, for, otherwise, a warrant of 50 acres might cover 500, and persons wishing to survey adjoining lands would be put to unnecessary expense and trouble. I do not contend it is absolutely *necessary* to have a certain *beginning*, though it is desirable. Where an entry is "of all the vacant land *within certain points*," or "including *certain* objects," it is sufficient. But, in the present case, *Depew's* entry was altogether uncertain; there being not less than three different places where he might have surveyed and satisfied the calls of that entry. Greater certainty is required, and attainable, in a settled country

(a) 1 Rev.  
Code, 144.

than in a wilderness; because, in the former, old lines are well known, and natural objects have fixed names.

It may be objected that Mrs. Howard acted improperly in shifting her location; but, being in possession, she had an undoubted right to pursue all legal means to protect her title; on the same principle which authorizes a third mortgagee to protect himself against a second by buying in the first.

2. The question now in dispute was proper for a *caveat*, and not for a Court of Equity. The bill assigns no certain reason for not prosecuting the *caveat*, but says it was dismissed, *either* because the small pox was at the Court-house, or the *caveatees* were out of the country. If the former was the case, it was a good ground for a *continuance*. If the latter, the Court should have directed a publication against the absentees. A *caveat* was peculiarly proper; since every ground of *equity as well as law* might have been taken upon it.

Call, in reply. Depew's entry was sufficiently certain. The words "joining the lines" must signify lying along the lines, in their whole extent; not barely touching them, as Mr. Wickham seems to suppose. The Surveyor and Depew supposed, from the narrowness of the space, that the 50 acres would fill it. No particular form of words is necessary in an entry; but certainly to a common intent is sufficient; and, as in *deeds*, so in *entries*, the intention of the parties ought to furnish the rule.(a)

There can be no inconvenience in an entry's covering more land than the party is entitled to; for any person wishing to make another entry has a right to call on the first locator to survey his land; as in the case of surplus land included in a patent.(b) A poor illiterate man ought not to be defeated of his property, because a public officer has made a mistake. In *Field v. Culbreath*,(c) and *Hunter v. Hall*,(d) the several entries established were not more certain than this. In *Currie v. Martin*,(e) Banks's entry

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(a) Pow. on  
Cont. 242. 6  
East, 104.

(b) 1 Rev.  
Code, 148.

(c) 2 Call, 647  
(d) 1 Call, 209.  
(e) 3 Call, 28.

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(a) Hughes's  
Kentuc. Rep.  
43.

(assigned to Currie) was more uncertain. The entry, too, was more uncertain in *Consilla v. Briscoe*; (a) and yet was supported by this Court, to which the appeal was taken from the Supreme Court for the Kentucky District. In *Miller v. Page*, it was held that the entry was too vague: but *there*, the word "between" certain lines was considered too indefinite: *here*, it is "joining the lines of John Howard," &c.; which is sufficiently certain.

(b) 1 Dow. on  
Mortg. 91  
titing Cases  
712. 20  
Mr. 640. L.  
note v. 12  
new.

A subsequent mortgagee, having prior notice of a second, has no right to buy in the first. (b) So here, Mrs. Howard, having knowledge of Depew's title, and fraudulently affecting to misunderstand it, shall not be protected by her subsequent entry.

(c) 1 H. & M  
806.

As to the question of jurisdiction, the case of *Witherinton v. McDonald*, (c) is clear authority that a Court of Equity is the proper tribunal to try the question of fraud in obtaining a patent.

*Wickham*. The case from *Hughes's Reports* has no application. It was a *settlement* case; and "that gives locality." Such is the express opinion of the Court. Added to which circumstance, the certificate of the Commissioners was considered part of the entry. *Miller v. Page*\* is a direct authority in our favour. In *Currie v. Martin* the "beginning" of the entry rendered it certain enough. In *Field v. Culbreath*, the entry, "including all the vacant land between certain lines" was also certain. As to Mrs. Howard's being bound to take notice of Depew's entry; she had a right to disregard it, if void; if not void, it stands on its own merits.

\* Note. In *Miller v. Page*, (May, 1806,) Miller's entry was for "1,000 acres, between the lines of Henry Cury, deceased, on both sides of Hatcher's Creek, beginning on the same." Judge ROANE was of opinion that this entry was sufficiently certain; but the rest of the Court decided otherwise.

*May 23, 1810.* The Judges pronounced their opinions.

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Judge TUCKER, after stating the case. As there is nothing in any part of the depositions to prove the charge of fraud in returning the survey, without such survey having ever been made, or in any manner to invalidate the matters contained in the several answers of the *Howards*, I pass them over.

The naked question upon this view of the subject is, whether the complainant has made out such a case as to entitle him to the aid of a Court of Equity. And I conceive he has not. The answers of the *Howards* state, that *Thomas Welch*, of whom they purchased in 1778 or 1779, had previously resided on the spot several years. They had a right to presume that he had some title thereto, which, if not perfected by a patent, was recognised by the act of *May, 1779, c. 22.*; and, when informed that there was danger of that title being disturbed, had a right to take any legal means whatsoever for securing the same. *Mary Howard's* entry, made the 9th of *October, 1788*, for this purpose, cannot therefore be deemed *fraudulent*, as against the complainant. If, by his entry of the 30th of *September* preceding, he had obtained an actual *legal* priority, he had nothing to do but to proceed to survey his entry, and obtain a patent for the lands; or, if she proceeded to survey also, then the law was open to him to file a *caveat*, in which case his *legal* priority must have been established, unless she had produced some elder title founded in law. But he tells us he did sue out a *caveat*. Why then did he not prosecute it with effect? Or, if *one caveat* was improperly dismissed, why did he not sue out *another*? for the *dismissal* of *one caveat*, unless it be upon the merits, neither decides the title to the lands, nor bars *another* subsequent *caveat*, if brought within proper time. (a) There was certainly time enough between the date of the defendants' entry in *October, 1788*, and their survey in *October, 1796*, and, from that period till the time

(a) *Hunter v. Hull, 1 Call, 206.*

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of the emanation of their patent, (which could not be until the survey had remained six months in the register's office,) to have tried his title to a patent, by that mode of proceeding. The law (for aught that appears to the contrary) was competent to have done him complete justice. Having omitted to pursue that course, as he might have done, he has, I conceive, no right now to ask for the aid of a Court

(a) 3 Call,  
259, 266. *Johnson v. Brown*.  
1 Wash. 113.  
*White v. Jones*.  
*Staplev. Webster*,  
October, 1804. Ms.

of Equity. (a) If *Mary Howard's* location of lands, within which his location might be supposed to lie, was against conscience, what must we say of his entry and location of a place which he knew to have been in the possession of *her husband*, and *Welch* under whom *he* claimed, for twenty years before? If equity condemns the former as against conscience, the latter is ten times more liable to its censure.

With regard to the second question, and upon which the Chancellor seems to have decided the cause, namely, whether *Depew's* entry was too vague and uncertain, I am decidedly of that opinion. From an inspection of the plat it will appear that the fifty acres might have been laid off, so as to "join the lands of *John Howard*, and his own land on *Welch's Run*," at any spot between the letter K. and the letter T. in the plat, leaving a surplus of from 150 to 200 acres, within that area, while his entry did not amount to more than a fourth part of the quantity therein. The distance from these points is considerably more than a mile and a half; while his survey, as actually made, only touches *Howard's* 58 acre tract, at the point B., leaving that point immediately, and running a zig-zag course of five different lines, before it arrives at his own line, on *Welch's Creek*, down which it runs only sixty poles, and from thence to the beginning, without even touching *Howard's* lands at any other point. Fifty, or even five hundred different plats might have been laid down within the same limits, equally conformable to the terms of his entry. Can this be called a compliance with the law, which prescribes that the party shall direct the location of the lands for which he makes an entry, so *especially and precisely*, as that others may be ena-

bled, with certainty, to locate other warrants on the adjacent residuum? I forbear to take up the time of the Court with a repetition of the reasons offered by me in the case of *Miller v. Page*, in support of the like opinion in that case; (a) and shall conclude with saying, I think the Chancellor's decree is right, and ought to be affirmed.

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(a) May,  
1806, MS.

Judge ROANE. The entry of Mrs. Howard, of March 14th, 1782, seems to have been justly abandoned on all hands as incompetent: that of Depew, on the contrary, of September 30, 1788, taken with reference to the actual situation of the land, as exhibited by the connected survey, seems to be sufficiently certain, under the just construction of the land law, by this Court in many instances, by the Supreme Court of the United States,\* and the Courts of the State of Kentucky. Having had occasion to refer to those decisions, particularly in the case of *Miller v. Page*, (MS.) I shall not again enter into the subject; but have no doubt but that the rejection of the entry now in question, would shake many titles in this Commonwealth, which have not been carried into grant. On the trial of a caveat, therefore, I should have been of opinion that that entry, so taken, was sufficient.

But this is a resort to a Court of Equity for relief against a legal title: and it is readily admitted that such resort may be had, under circumstances making the interposition of equity just and proper; as in the case of *Jones v. Williams*, (b) where the caveat had been dismissed through an accident attending the summoning of the plaintiff's witnesses; but, then, this must be made to appear to the satisfaction of the Court, as was done in that case. In the case before us it is alleged that the caveat of the appellant was dismissed, because he could not attend to it on account of the small-pox, or because two of the appellees resided out

(b) 1 Wash.  
230.

\*Note. See *Wilson v. Mason*, 1 Cranch, 83, 89, 92.

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of the State, so that the summons could not be served upon them. With respect to the first fact, there is no proof of it whatsoever: and as to the second, the *caveat* would not have been dismissed, I presume, (if it were not served,) if the appellant had shewn to the Court that its non-execution did not proceed from any neglect of his. I infer this from the 35th section of the land-law.(b)

(a) 1 Rev.  
Code, p. 146.

On neither of the grounds, therefore, was the appellant competent to come into equity. But, if it were otherwise, as to his admission into the Court; the appellees having got the *legal* title, that title will not be disturbed, unless the appellant has a superior right in equity to recover the *identical* land in question. So far from this being the case, it is in proof, from the confessions of the appellant's father, at a date posterior to the time of making the subsequent entry of the appellee, that he did not consider *this land* as vacant, and therefore supposed it was not located or appropriated thereby. His own construction of his entry, therefore, invalidates it, in a Court of Equity, as applying to *this* land; which might have been otherwise, under my construction of the land-law upon this subject, in the absence of all proof touching such a construction on his part. I am therefore of opinion that the decree be affirmed.

Judge FLEMING. It is unnecessary to add any thing to what has been said. I think it a very *just* decree; and it is affirmed by the unanimous opinion of the Court.

Lewis against Madisons.

Wednesday,  
May 2.

UPON an appeal from the Superior Court of Chancery for the Staunton District, in a suit on behalf of the children of William Madison, deceased, (by Elizabeth Madison, their mother and next friend,) against Andrew Lewis, to recover a tract of land in the County of Botetourt, known by the name of Voss's, which had been devised by John Madison, father to Rowland Madison, brother of William, and by the said Rowland sold to Lewis, but, the plaintiffs contended, should have been conveyed to them, in consequence of an agreement, dated the 10th of October, 1780, between the said Rowland and William.

By that agreement, under their hands and seals, (being in the life-time of John Madison, their father,) reciting, "that Rowland having disposed of a tract of land in Kentucky containing one thousand acres, the property of William, FOR WHICH HE WAS TO GIVE HIS LAND in Botetourt in exchange, but, since finding it would be a disadvantage to him to comply with the bargain," William agreed to "CANCEL THE SAME, IN CASE Rowland would make him a title to the same quantity of land above mentioned: only provided the said land was obtained by a military warrant agreeable to his Majesty's proclamation, and clear of any disputes whatever: but, in case Rowland should not do this, he agrees that the FIRST BARGAIN shall be binding on him; that, when he comes to the possession of his land WILLED to him, that he will make William a title to the land, first having both tracts valued; and whatever should be judged to be the difference each party agrees to give or take: and to the true performance of that agreement, each bound himself to the other, in the penalty of two thousand pounds specie."

It seems, that the vendor, or his legal representatives, ought to be parties.

1. It seems, that a contract, under seal, between two brothers, by which one of them, for a fair and valuable consideration, agrees, that, when he shall obtain possession of a tract of land expected to be devised to him by their father, he will convey it to the other, is not considered *bonae fidei*, and may support an action of covenant at law, or be enforced specifically in a Court of Equity.

2. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question.

3. In a suit in Chancery to recover a tract of land against a vendee, on the ground that the ven-



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Upon this contract, and the evidence in the cause, the chief points in controversy were whether, by *Rowland's* failure to make *William* a title to the land in *Kentucky*, a lien attached, in favour of the latter, upon the particular tract called *Voss's*; and, if so, whether *Lewis*, the purchaser from *Rowland*, was bound by such lien. All the circumstances are so fully set forth in the ensuing opinions of the Judges of this Court, that a farther statement by the Reporter seems unnecessary.

November 29, 1804, the Chancellor appointed Commissioners to ascertain and report the respective values of the said one thousand acres of land in *Kentucky*, sold by *Rowland Madison* to *John Gordon*, and of the land devised to him by his father, on the day of , 1784, when he took possession, or was entitled; also to report an account of the rents and profits of the devised lands, and of the permanent improvements made thereon since the said *Rowland* took possession; and decreed that, "upon the plaintiff's paying the defendant whatever sum the value of the devised land and permanent improvements thereon should exceed the value of the one thousand acres, sold by *Rowland* as aforesaid, and the rents and profits of the devised land, (if there should be any excess,) then the defendant should convey to the plaintiffs the land in controversy, with special warranty against himself, his heirs, and all persons claiming under him; but, should the value of the devised land and the permanent improvements thereon, as aforesaid, fall short of the value of the one thousand acres aforesaid, and the rents and profits of the devised land, then the defendant should moreover pay and satisfy to the plaintiffs the deficiency, so far as that deficiency may be occasioned by the rents and profits aforesaid, and no farther." From which decree the defendant appealed.

*Wurden, Wirt, and Call*, for the appellant, contended, 1. That the contract between *William* and *Rowland*, having been made in their father's life-time, and attempting to dis-

pose of a contingent interest expected to be derived from him at his death, was *contra bonos mores*, and not to be countenanced in a Court of Equity; in support of which point, *Justinian's Code*, b. 2. tit. 3. s. 30. and 1 *Brown's Civil and Admiralty Law*, p. 11. were cited. (a) Such rule according to the civil law: but, at common law, also, every contract inconsistent with good morals is void. (b) The case of *Nelson v. Nelson* (c) does not contravene this position; for, in that case, the doctrine was not settled, but mentioned only incidentally; so that what fell from the Court was merely an *obiter dictum*.

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(a) See 2 Com. Dig. p. 165. and Jones on Bailments, p. 15, 16.  
(b) 2 Atk. 224. Powell v. Knowler.  
(c) 1 Wash. 130.

By *Peyton Randolph*, *Botts*, and *Wickham*, contra, the case of *Nelson v. Nelson* was relied upon as express authority. The agreement was fair and liberal on the part of *William*; and *Rowland* having unlawfully sold and converted to his own use a tract of land belonging to his brother, his desire to make amends for that injury was a sufficient consideration on his part. The contract, therefore, was lawful and praiseworthy; and, being under seal, an action of covenant could have been maintained upon it; (d) since there was nothing in it *malum in se*. There is a large class, of bonds in *England*, called *post-obit* bonds, which are always considered good where no undue advantage has been taken; though, in cases of injustice, or hardship, equity will relieve. (e)

(d) Co. Litt. 906. b.

(e) *Chesterfield v. Jansen*, 1 Atk. 301.

2. The counsel for the appellant farther urged, that this contract, relating, not to any immediate title, but a remote possibility without present interest, was void. It is, indeed, laid down in the books that a possibility may be assigned, released, or mortgaged: but there must be an inception of right. (f) And even that cannot be transferred to a stranger. (g)

(f) 10 Co. 50. b. 2 Co. 57.  
(g) 11 Mod. 152. Cro. Car. 477. Cro. Eliz. 501. *Yelverton v. Yelverton*. *Hobart*, 132. 3 Term Rep. 93. *Jones v. Roe, Lessee of Perry*.

On the other side, it was objected, that these authorities all related to conveyances, and not to covenants to convey.

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The true doctrine is, that *covenants* to convey possibilities are good, though *conveances* are not. (a)

3. The contract, even if binding between the parties, operated no *lien* upon the land; since it did not apply to the *particular tract* called *Voss's*. Indeed, according to the evidence, the name *Voss's* was applicable to the whole of a larger tract, of which this was the *upper* part. At the time of the contract, the *testator* was living on the *upper* part, and *William* his son on the *lower*, which, however, was then intended by the testator for *Rowland*. The *lower* part, then, was in contemplation, and *not the upper*, which the testator (having changed his mind) afterwards devised to him. Suppose the contract had specifically mentioned this lower part of the tract, and the testator had afterwards devised the upper, would the Court have had the power to *contravene* the express terms of the contract? If not, neither have they the power to *change it* in this case, where the lower part was as well known to have been contemplated as if it had been specifically mentioned. If this were a *mortgage*, would it be in the power of the Court to *shift the lien* from one tract of land, and fix it on another?

Admitting the tract now in dispute had been the tract intended; the contract could, at utmost, only be regarded as a *conditional sale*, and *not a mortgage*; for the *Botetourt* land was a mere ulterior security, or pledge, in case the *Kentucky* lands were not to be had. The breach of the covenant lies, therefore, *in compensation*, and the land itself should not be liable. (b) A *lien* never is created, where the vendor has not power, *at the time of the contract*, to bind the estate. (c)

*In answer to this*, the construction put upon the evidence was denied, and the tract now called *Voss's* was insisted to have been the tract intended by the parties; of which the appellant *Lewis*, from his connection with the family, and being one of the administrators of *William Madison*, must have been apprized. At any rate, it being in proof that *Mrs. Elizabeth Madison* gave him notice, *before his last*

(a) 1 Atk 385.  
2 P. Wms. 182.  
Beckley v.  
Newland. 1b  
191 Hobson v.  
Trevor. 1 Vez.  
409 Wright  
v. Wright.

(b) 1 Vern. 79.  
167. Popham  
v. Bamfield  
2 Vern. 222.  
Woodman v.  
Blake. 2  
Vern. 352.  
(c) 2 Call,  
298. Walcott  
v. Swann.  
Moseley, 97.  
114. 119. 1  
P. Wms 104.  
Collins v.  
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payment of the purchase-money, and before he received the conveyance, this was sufficient to bind him. (a)

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But, 4. for the appellant. This notice was not sufficient to bind him; there being nothing which shewed a lien on the land in question. Indeed, if such a lien could ultimately exist, it might never have attached. For aught that appears to the contrary, the land in Kentucky may yet be got. No eviction or loss of that land is proved; and without evidence of this, the heirs of Wilkam have no claim upon the Botetourt land. (b) Lewis therefore remains a bona fide purchaser without notice, against whom a Court of Equity will never decree specific performance.

5. The proper parties are not before the Court. If the contract is regarded as a mortgage, the executor of the mortgagee, and not his heirs, should be the plaintiff. (c) The widow of Rowland Madison was a necessary party, because entitled to dower. If she was not so entitled in this case, a man might deprive his wife of dower by anticipating and passing off his acquisitions. The personal representatives of Rowland were also material parties; not only on account of their interest, but for the sake of information. Being possessed of his papers, they might, by their answers, give all-important information.

To this it was answered, that a suit to foreclose a mortgage may be brought against the heir of the mortgagor, without making his executor a party;\* and, by parity of reason, the suit here being to recover the land specifically, the heirs were the proper plaintiffs. If the widow of Rowland Madison be alive, as suggested, (of which there is no proof,) she need not be made a party. Her dower-right is paramount to any other, and cannot be affected by the event of this suit.

The rule (though general) that all persons interested

(a) *Mif.* 215.  
3 *Atk.* 304.  
*Hurdingham*  
v. *Nichols*.  
1b. 315. *Rad-*  
*ford v. Wilson*.  
*Sugden*, 487.  
2 *Eq. Cas.*  
*Abr.* 685. pl.  
*J. Jones v.*  
*Stanley* 1  
*Atk.* 384.  
*Wigg v. Wigg*.  
3 *P. Wms.*  
307. *Tourville*  
v. *Naish*. 2  
*Atk.* 630. *Sto-*  
*ry v. Lord*  
*Windsor*. 1  
*Ch. Cas.* 34.  
*More v. May-*  
*hew*.  
(b) *Yancey v.*  
*Lewis*, 4 *H. &*  
*M.* 390.  
(c) 1 *Ch. Cas.*  
51. *Powell*,  
1047, 1048.

\* Note. See *Graham's Ex'rs v. Carter*, 2 *H. & M.* p. 6, 7. *Fell v. Brown*  
2 *Bre. Ch. Cas.* 279. 3 *P. Wms.* 338. note A.

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146.(b) <sup>1</sup> *Rev.*  
*Code*, p. 116.  
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must be parties, is yet liable to exceptions, according to the circumstances of each case. (a) In *Collins v. Griffiths*, 2 P. Wms. 313., it was decided that the executors of a deceased obligor in a joint and several bond may be sued in equity for the debt, without making the surviving obligor a party. So, in *Harris v. Ingledew*, 3 P. Wms. 93, 94. the suit being to subject lands devised to the payment of debts, and the devisees having been in quiet possession eleven years, a sale was decreed without the heir being a party: and in *Darwent v. Walton*, 2 Atk. 510. where one partner was out of the kingdom, the partner before the Court was compelled to pay the whole demand. In this case, the fact is established that Rowland Madison died insolvent, in another State; and there is nothing in the record to shew who his representatives were, or whether he had any. But, if their names were known, the act of Assembly, which authorizes proceedings against absent defendants, applies only to cases where a plaintiff wants a decree, but does not compel him to proceed against them. (b) Here the plaintiff did not want the representatives of Rowland Madison to be parties, as nothing could be got from them. It was the duty of the defendant to have called upon them for aid, if he wanted the information they could furnish.

In reply, it was said there was no proof of the insolvency of Rowland Madison; neither was it averred in the bill, or proved, that his heirs resided in Kentucky. But, if such were the case, the plaintiffs were bound to make the proper parties, not for their own convenience, but the justice of the case. The authorities cited, as exceptions to the general rule, are not apposite to this. In each of those cases, the defendants, who were separately sued, (or the lands held by them,) were considered individually responsible for the whole claim of the creditor: of course there might have been no necessity to make other parties. Yet the case from 2 P. Wms. 313. seems inconsistent with the later authority of *Madox v. Jackson*, 3 Atk. 406. In this

suit, it is essential that *Rowland Madison's heirs* should be parties, whether he died insolvent or not; for they are interested in the question concerning this land, the title to which is derived from him. Besides, the derivative purchaser has, universally, a right to the assistance of the vendor, or his legal representatives; because they can prove whether the contract was discharged or not. They cannot be examined as witnesses, because they are interested; and the rule is universal that, where, on the ground of interest, a person cannot be used as a witness, he must be made a party. (a) If *Lewis*, on being cast, were to sue the heirs of *Rowland* for compensation, they might yet prove against him, that *Rowland* satisfied the contract to *William*; for, not being parties to this suit, they would not be bound by it. But he should not be driven to this alternative; for a Court of Equity abhors circuity of action, and ought to prevent multiplicity of suits. (b) There was no necessity of a demurrer for want of parties; for in *Call v. Scott*, and *Hoover v. Donnelly*, there was no demurrer. (c)

Tuesday, May, 29th. The Judges pronounced their opinions.

Judge TUCKER, after reciting the terms of the agreement between *William Madison* and *Rowland*, proceeded as follows:

To this contract *Gabriel Madison*, a third brother, was the only subscribing witness. It was proved by him and recorded in *Lexington District Court*, State of *Kentucky*, Sept. 18, 1800, almost twenty years after its execution, and six months after this suit was brought.

On the same day that this contract was entered into, *Gabriel Madison* agreed to let *Rowland* have land in *Kentucky*, under the proclamation, to enable him to comply with that contract. *William* was privy to this agreement, and afterwards (as *Gabriel* thinks) made choice of 1,000 acres on *Simpson's*

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(a) 1 Call,  
428. *Harri-  
son v. Harrison*, 5  
H. & M. 316.  
*Hoover v.  
Donnelly*.

(b) 3 P. Wms.  
333. *Knight v.  
Knight, How.  
Excheq.* 216:  
*Harr. Ch. Pr.*  
35. (last edit.)  
16 Viner, 248.  
pl. 6. *Call v.  
Scott*, (MS.)  
(c) See also  
16 Viner, 267.  
pl. 1.

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*Creek*, in a letter written to *Gabriel*, who had 3,000 acres in *Kentucky*, of which *William* was to have choice.

On the 14th of *July*, 1781, *William Madison* conveyed to *John Gordon*, 1,000 acres of land on *Boon's Creek*, *Kentucky*. This, it is said, is the land which *Rowland Madison* had, previously to the above-mentioned contract, sold to *John Gordon*, without any authority from *William*, and received some trifling consideration for, from *John Gordon*. But the consideration expressed in the deed, is one hundred pounds, current money of *Virginia*, in hand paid by *Gordon* to *William*. No other, or further consideration is mentioned.

On the 5th and 6th of *November*, 1781, *John Craig* and wife, by deeds of lease and release conveyed to *William Madison*, four hundred acres of land in *Montgomery County*, *Virginia*, called *Hand's Meadow*. This land is said to have been given by *Craig* to *Madison*, in exchange for the 1,000 acres on *Simpson's Creek*, which *Gabriel*, in behalf of *Rowland*, was to furnish *William* with; but the consideration expressed in the deed of release is 400*l.* current money of *Virginia*, by *Craig* to *William* in hand paid. *Hugh Crockett* states, that he understood from both *Craig* and *Madison*, that the *Simpson's Creek* land, and 125*l.* specie, were to be in full of this land; that, since *William's* death, (which happened in *March*, 1782, and in the life-time of his father,) he has understood and believes, one *Hite* had established a better title to the *Simpson's Creek* lands; that *Craig*, in his presence, applied to *Gabriel*, in whom the legal title, under which *William* claimed, was, to make him a deed, which *Gabriel* said he could not do, but would give him in lieu of it 1,000 acres on the *Ohio*; which offer *Craig* refused, and has since informed the witness that he had got the *Hand's-Meadow* tract back, and was in possession of it; though the witness understood the legal title thereto is still in *William Madison's* heirs, the present complainants.

In *March*, 1782, *William Madison* died intestate, and the bill charges that *Thomas Madison*, *William Preston*, and the

defendant *Andrew Lewis*, took out letters of administration on his estate, and of course that they possessed themselves of and examined all his papers, among which the agreement first mentioned was, which was by no means a secret in the family. The answer denies that *William's* papers were ever in the defendant's hands; alleging that they were delivered to *Thomas Madison*, by *William's* widow; he, *Thomas*, having signified the advantage of his keeping the papers, as he was a practising lawyer.

In *March*, 1784, or before, *John Madison*, the father of *William*, *Rowland*, *Gabriel*, and *Thomas*, died. By his will he devised to his wife the plantation whereon he then lived, during her life. And, as to the lands whereon he then lived, and whereon his son *William* lived, he devised the upper part, whereon he then lived, to his son *Rowland*, in fee-simple; and the lower part, whereon *William* lived, to *William's* widow for life, with remainder to the present complainants. The upper part, thus devised to *Rowland*, forms the subject of the present controversy.

The bill charges, that at the time of the agreement entered into between *William* and *Rowland*, as before stated, it was well known among the brothers, and others, that their father intended to devise that part, called *Voss's*, to *Rowland* in fee; and that it was this identical land which *Rowland* bound himself to give *William* in recompense for the *Boon's Creek* land, (which he had sold, as stated in the agreement,) in case he failed to comply with his engagement, to make *William* a clear and undisputed title to 1,000 acres of military lands: that *John Madison*, the father, was acquainted with the existence of this contract, and by no means disapproved of it; as in a will of an early date he had devised the same lands to *Rowland*, and, though shortly before his death, he altered his will in some other respects, he continued that devise to *Rowland*; that the defendant, *Andrew Lewis*, had married a sister of *William* and *Rowland*, and was unusually intimate with them and their af-

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fairs, and very high in their confidence and that of the family; that he qualified as administrator of *William*, as before mentioned, and acted as such in a variety of instances; whereby, and by reason of his intimacy and connection with the family, he must have been acquainted with the agreement before mentioned; and, but for the grossest negligence, might have known of *William's* title to the land bequeathed to *Rowland* by his father; notwithstanding which, he purchased the same of *Rowland*; and the bill suggests, as a motive thereto, that a great part of the purchase-money consisted in a debt or debts due to him from *Rowland*, who was, at that time, in circumstances which threatened he would break, and who, since the purchase, actually became insolvent, after having removed out of the State so that *Lewis* believed he had no other mode of securing his debt, but by that purchase; that after the purchase, and before any conveyance was made from *Rowland* to *Lewis*, *Elizabeth Madison* was appointed guardian to her daughters, and gave *Lewis* notice she would institute a suit for *Voss's*, (the land in controversy,) as she was satisfactorily advised *Rowland* could not make a title to 1,000 acres of military land in *Kentucky*; notwithstanding which, *Lewis* paid up the balance of the purchase-money to *Rowland*; that *Rowland* never did tender or survey the 1,000 acres of military lands, which might have been substituted for the *Virginia* lands, according to the agreement; and that the *Kentucky* land is worth from 3,000 to 5,000*l.*, and would be preferred by the complainants, under existing circumstances.

The answer of *Lewis* states the devise to *Rowland*, as made in pursuance of a promise made when he was about to marry; that *Rowland*, who, at his father's death, (early in 1784,) resided in *Kentucky*, returned and settled on *Voss's*, and resided there till 1790: that being desirous of removing again to *Kentucky*, he proposed to sell *Voss's* to the defendant, who, believing the title derived from his father was a good one, free and clear from all encumbrances, purchased it at the price of 2,000*l.*: he admits that about 300*l.* of the

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purchase-money consisted of a debt due from *Rowland* to himself, but denies the motive was to secure that debt, as *Rowland* was then solvent for a much larger sum. He obtained possession in 1790, having made payment to the amount of about 1,875*l.* including the above debt; the sum of 125*l.* being left in his hands towards discharging a debt of *Rowland's*. "And in that situation the case remained until some time in the year 1792, when, to his surprise, the complainant *Elizabeth* informed him of the contract mentioned in the bill." He positively denies that he had any notice of the contract; for, although he was one of *William's* administrators, and took some care of the estate until the sale, yet his papers were never in his hands, but were delivered to *Thomas Madison* by his widow, the complainant *Elizabeth*; that although *Thomas Madison* drew the articles of agreement between the defendant and *Rowland*, and the bond for a title, yet he gave him no notice of the contract between *William* and *Rowland*, as he could have proved if the suit had not been delayed till after the death of *Thomas*; and believes it was kept a secret from their father. He admits that, after the notice given him in 1792, as before stated, he did, in pursuance of an award, pay to *Rowland*, 175*l.* or thereabout, and received his title; being, as he supposed, the most prudent course for him to pursue.

*Rowland Madison's* bond to *Lewis* to make him a title to *Voss's*, bears date December 5, 1789. He removed to *Kentucky*, as appears by the deposition of *William Lewis*, in October, 1790. Another witness, *Hugh Crockett*, proves, that Mrs. *Elizabeth Madison*, the guardian of the complainants, and widow of *William*, rode with *Rowland* and his wife 15 or 16 miles, when they set out on their journey to *Kentucky*; and this it is stated happened the day before the payment, either of the balance of the purchase-money, or of the principal part of it, (for it is not quite clear which is meant, though I rather think the balance,) by *Lewis* to *Rowland*. *Lewis's* answer fixes the period when he first

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received notice from Mrs. *Madison*, to the year 1792. Another witness, *James Barnett*, states that he was present at what he conceived to be a final settlement between *Lewis* and *Rowland*, the day before the latter set out for *Kentucky*. *Hugh Crockett*, as attorney in fact for *Rowland*, executed a conveyance to *Lewis* for the lands, after *Rowland* had removed to *Kentucky*. This witness, in answer to a question whether he did not know that *Lewis* had notice of the complainant's claim to *Voss's*, before he made the deed under the power of attorney from *Rowland*, answers, "I do not know whether it was before, or after, but think it was about that time, that *Lewis* and Mrs. *Elizabeth Madison* had some conversation in this deponent's presence, respecting the complainant's claim, and this deponent recollects that he was apprehensive of some danger from acknowledging the deed, and took advice upon the subject; but the cause of his apprehension he does not at present recollect." There is no evidence whatsoever to contradict that part of *Lewis's* answer wherein he denies notice until 1792. Nor is there any reason to infer from the publicity, or notoriety of the transaction between the brothers, that he had notice. And, although it appears to have been known not only to *Gabriel Madison*, but to his brothers *Thomas* and *George*, yet no communication or hint of it appears to have been given by them, or any other person, to *Lewis*. *Rowland*, when he removed to *Kentucky*, carried a considerable property with him, in negroes, wagons, horses, and other things: and, though he seems to have been considered as an extravagant man, his circumstances at that time appear to have been unembarrassed, and his credit good.

I cannot agree with the counsel for the appellant that the contract between *William* and *Rowland*, for an eventual satisfaction for an unauthorized sale by the latter, of the *Boon's Creek* tract of land, which belonged to the former, was, under the circumstances of this case, *contra bonos mores*. If, as stated in the answer, and perhaps in some other parts of the record, their father, in contemplation of *Row-*

land's marriage, had made him a promise to give him a particular tract of land, I can see nothing immoral in a promise, to his brother, eventually to make him satisfaction for the wrong he had done him, out of that land, when he should come into possession of it; if he did not before make him a compensation in the manner stipulated by their agreement. And, if such a promise had been proved, and the land which was the subject of it, *clearly identified*, I do not know how a Court of Equity could have refused to decree a specific performance of that agreement between the parties themselves, or their legal representatives. (a) But I am not satisfied, from any thing in this record, that the father made any such promise; or, if he did, whether it ought to be understood as relating to the *upper* or the *lower* part of the tract called *Voss's*. Nor, perhaps, would this be a matter of any importance, if this suit had been brought against *Rowland* in his life-time for a *specific performance* of this agreement between himself and his brother. But that not being the case, the question, between the *present parties*, must, I conceive, turn upon points altogether different; since the question of *notice* seems to be naturally connected with that of *certainty*. The written contract between *Rowland* and *William Madison*, is entirely defective in this particular. According to the grammatical sense of it, it would appear to relate to some lands in *Virginia*, which had been *BEFORE that time* devised to *Rowland*, by *some person or other*, and to which his title was indisputable, though, from some cause or other, he had not yet obtained the possession. But *who* the testator was, and *where* the lands might lie, within the County of *Botsourt*, in the State of *Virginia*, can no more be discovered from this contract than the way of an eagle in the air. Neither is it more certain, if considered as a contract concerning lands in *expectancy*, and to be given him by *some person not yet deceased*. And, however the maxim "*id certum est quod certum reddi potest*" may apply to such a contract, as between the *parties*, or *privies thereto*, it has, I

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(a) *Hobson v. Trevor*, 2 P. Wms. 191.  
*Beckley v. Newland*, ib. 182.  
*Wright v. Wright*, 1 Vez. 409.

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conceive, no application to a stranger, who may become a fair purchaser for a valuable consideration. For such a construction would tend to lock up all the property in lands within the State, and render them perfectly unalienable.

In contracts of this nature we are told by the author of

(a) 1 Fonb. b.  
1. c. 4. s. 2.

the celebrated treatise on equity, (a) that the Court *does not bind the interest*, but, instead of damages at law, enforces the performance in *specie*: that is, as I understand the book, as between the *parties* to the contract; for, *without binding the interest*, I cannot discover how a *purchaser* of

(b) 2 Fonb. b.  
2. c. 6. s. 2.  
Fremoult v.  
Dedire, 1 P.  
Wms. 429.

it could be affected. (b) The rule in equity is, that, where a man is a purchaser without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better *title* or *RIGHT TO CALL FOR* the legal

(c) 2 Vern.  
600. Wilker v.  
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estate than the other. (c) To apply this; *A.* being indebted to *B.* covenants with him to convey to him a certain *non descript* tract of land, which he either hath, or expects to have, by the benevolence of some friend. *A.* afterwards becomes possessed of certain lands by devise from his father, enters therein, and resides thereupon several years: *C.*, without notice of this covenant between *A.* and *B.* purchases these very lands; pays the whole or nearly the whole of the purchase-money to *B.*; obtains possession; enjoys and improves the lands for two years; and then pays up the balance, and obtains a conveyance, but, previous to such last payment, receives notice. Which of these persons, in the eye of equity, and reason, had the *better right to CALL FOR the legal estate*, at the time when *C.* obtained his conveyance. Surely he whose contract was most clear and certain, as having *these very* lands and *no* other, in contemplation; whereas the other might be satisfied by a hundred different tracts, provided they lay in a County containing several millions of acres. Nor can I by any means agree, that the payment of the balance of the purchase money, (after notice of this *uncertain* contract,) and taking a conveyance, shall, by mere *relationship*, be taken as strongly against him, as if he had had the fullest and most

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complete notice, before he had entered on the lands, or paid a shilling of the purchase-money. For the principle upon which a Court of Equity proceeds in setting aside contracts by subsequent purchasers, on the ground of *notice*, appears to be, that the first contract creates a *specific lien* upon the lands. But that cannot be, where the contract is so uncertain, as that, if it were immediately published in a gazette, no stranger could be thereby admonished further, than not to deal at all with such a person for ANY lands, either that he *hath*, or *thereafter* may have, as long as he lives. But such a warning as this must be void; as against all the principles of social life and intercourse. I agree, therefore, to what was said in the case of *Walcott v. Swann*, (MS.) that those decisions which apply, on this point, with respect to a definite ascertained portion of property, will not extend to a vague and *indefinite* contract of this kind; it being a leading principle that, to affect a subsequent purchaser on the ground of implied notice of a former title, there must be something to lead such purchaser distinctly to a knowledge of such title, with reference to the *identical specific* property in question.

It is material in this case to observe, that the first notice which *Lewis* received of this contract was after *Rowland Madison* had removed to *Kentucky*, and had put *Lewis* into actual possession of the lands, having before that time received the whole of the purchase-money, except a small balance, and *that* undertaken to be paid to a third person. And all this happened under the eyes of the widow of *William*, and with the actual privity and agency of *Thomas Madison*, his administrator. So far as the *personal* estate of *William* might *possibly* be benefited by the specific performance of the contract between *William* and *Rowland*, these circumstances would operate to rebut every ground of equity which either the widow or the administrator might pretend to.

There is still another important point in this case. Even supposing the contract sufficiently certain to designate *Voss's*

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as the subject of the *eventual* agreement between *William* and *Rowland*, still, in respect to that tract of land, there was a mere *contingent liability*, in case something, which was covenanted to be *previously* done, should not be done. So that here was a *contingency* upon a *contingency*. Such contingencies, even in *wills*, are not often favoured. But where they occur in a deed, and, much more, where they relate to lands, which the covenantor neither possesses at the time, nor even has a *scintilla* of right to, either in law or equity, I believe no case can be produced, and certainly none has been cited, to shew that they have ever been carried into effect. But, were it possible that such a *double contingency*, as THIS IS, could be considered as proper to be carried into specific execution, it is further observable, that steps had been taken from its very commencement, by *Rowland*, to *procure* the *military* lands; that *William* made choice of *one tract* of 1,000 acres; that upon its being discovered that a good title could not be made to *that*, *Gabriel* was ready to have given another tract of 1,000 acres on the *Ohio*; that no *laches* are imputable to *Lewis*, who was no party to that contract, in not procuring a conveyance; and that *Rowland* never parted with his 1,000 acres, until after *Lewis* had *paid him up fully*, and had *got a conveyance*, for *Rowland*, as appears by *Gabriel Madison's* deposition, never sold this land until after the year 1795. And, possibly, nay, probably, had the suit against *Gabriel*, which *Walter Bell* brought for a conveyance of the *Ohio* land, been defended properly, no decree would have been made in *Bell's* favour to the prejudice of the present complainants. So that the *contingency* by which *Voss's* could have been made liable, did not actually happen until several years after the land was purchased, entered upon, paid for, and a conveyance executed. Under such circumstances, I cannot regard *Lewis* in any other light than as a fair purchaser, without notice of any actual charge or encumbrance on the lands purchased, either at law or in equity, and therefore think the decree erroneous upon that ground. I have not considered the question as to the want of parties, but, as at present ad-

vised, (though I mean not to give any opinion upon it,) the representatives of *Rowland*, and the several representatives of *William* seem necessary to have been before the Court, in order to do complete justice, if a decree for a specific performance of the contract should have been thought proper. But, as my opinion is not so, I pass over the question, and conclude with giving my opinion that the decree ought to be reversed, and the bill dismissed with costs.

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Judge ROANE. This is a bill brought by *Elizabeth Madison*, as mother and next friend to her infant daughters, against the appellant. The bill was exhibited in *May*, 1800; and its object is, to enforce the specific execution of an agreement of *October 10*, 1780. *John Madison*, the grandfather of the infant appellees, having died prior to *March*, 1784, when his will was proved, it follows that more than sixteen years had elapsed between the time when the contract came into existence, and might have been enforced, (if at all,) subject to the life-estate of the testator's widow, (the precise time of whose death does not appear,) and that of the institution of the suit: and, if a reasonable time should also be allowed to enable the appellees to get a title to the *Kentucky* land, which, in the first instance, was to be conveyed by *Rowland Madison*, and for which the contract (as it related to the *Virginia* lands) appears only to have been intended as a security, still a very great space of time was suffered to elapse prior to the institution of the suit. In the mean time *Thomas Madison* died in 179—, who, as administrator of *William Madison*, was possessed of his papers, till about the year 1787, and, among them, it is presumed, of the contract now endeavoured to be set up; and who (as is evident from the testimony actually given in this cause) could have thrown much light upon the subject. *Rowland Madison* was also suffered to die about the year 1798, who, possibly, in his life-time, could have defended himself more efficiently against this claim than the present appellant can; and whose papers and representatives, if even they were before the Court, might pos-



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sibly operate to the same purpose; but his representatives are not parties to this suit! In the mean time also *Rowland Madison* was permitted to return from *Kentucky*, and reside upon the land in controversy 3 or 4 years, and sell the same to the appellant, for a full and fair price, without any notice whatever of the encumbrance, as appears by the testimony; to move away, full-handed as to property, accompanied on part of the journey by *Mrs. Madison*, the mother and next friend of the appellees, who never gave any kind of notice of the claim, although she or her brother was possessed of the papers before that time, and although she had, (as is proved by *J. Smith*,) between 1783 and 1788, frequently spoken of this contract, but that in a confidential manner. It was not until 1792, perhaps two years after the purchase by the appellant, that the said *Mrs. Elizabeth Madison* apprized him of her claim. As for *Thomas Madison*, the only acting administrator of *William Madison*, and who was possessed of his papers till 1787, (*Andrew Lewis* having never been possessed thereof,) he is not only not proved to have ever mentioned the contract to *Andrew Lewis*, but, on the contrary, his conduct on several occasions purported that he knew of no effective lien thereon, and, in particular, in his having drawn the title-bond, of *December 5, 1789*, from *Rowland Madison* to *Andrew Lewis*. So, also, *Mr. Francis Preston*, who, probably, as brother to *Mrs. Madison*, was possessed of the papers in question, (See *Susannah Madison's* deposition,) from the year 1787, forwards, not only never mentioned this claim to the appellant, or any other, but, in the year 1790 or 1792, wrote to *Gabriel Madison* concerning the *Simpson's Creek* lands, which had been elected in discharge of the contract; and was thereupon informed by the said *Gabriel Madison* that he was ready to convey them upon getting the release of *Rowland Madison*. All these circumstances of assent, acquiescence and encouragement, on the part of the natural friends and guardians of the infants, and, above all, the suffering *Rowland Madison* so long to possess, and then sell out the land, without objection, would

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be undoubtedly powerful enough, of themselves, to put an end to this controversy, but for the consideration (as to which, however, I mean to pass no opinion in this case) of the very great tenderness shewn to the interests of *infants* in the Courts of Equity. The land, which is now sought for by the appellees, was not only not demanded within a reasonable time, but a good reason is found therefor, in that *William Madison*, in his life-time, had elected the *Simpson's Creek* lands, and conveyed them, with a general warranty, to *Craig*, who was extremely importunate to get those *identical* lands, and those only. A conduct, therefore, marked by all the foregoing circumstances, and a delay arising from, if not accounted for, by the consideration of the conveyance of the *Simpson's Creek* lands to *Craig*, (which also is not to be affected by the *subsequent* arrangement with *Craig* in this particular,) ought not to operate injuriously to the appellant: nothing in our code of equity could possibly have that effect, (as I have before said,) but the extreme tenderness of that code for the rights of infants; if even that consideration should be found to turn the scale, under all the circumstances of this case.

It is not necessary, however, to decide this cause upon the foregoing grounds. It is not necessary to decide whether that mother who, as natural guardian to her children, has brought this suit in the character of next friend, was also competent by her acts and conduct to bind them; nor whether the acts of even the whole *congeries* of their natural and constituted friends and protectors were competent to work this effect. This cause may well go off, on ordinary grounds, and independently of all the foregoing considerations.

The question before us is, (for such is the prayer of the bill,) whether the appellees are entitled to a conveyance of the specific tract of land now in question. Putting out of this case so much of the contract of *April 10, 1780*, as relates to the military land, which appears to have been the principal object contemplated by the parties, and on that

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ground, perhaps, accounts for the *vagueness* of the contract taken in relation to the *Virginia* lands, let us examine this contract, in relation to the lands last mentioned. That contract is to convey, eventually, "*his*" (*Rowland Madison's*) land in *Botetourt*; and again to convey "*his* land *willed* to him," when he comes to the possession of it; and that he, *Rowland Madison*, will make *William Madison* a title to "*the land*," first "*having both tracts valued*," &c.

While the first expression in this contract, "*his*" land, would seem to import that the land contemplated, was land of which *Rowland Madison* was *then* possessed, or to which he was at least entitled, the second expression only enlarges that description to land *then* "*willed*" to him. It would seem to be incumbent on the appellees, therefore, to shew that the land in question then stood in that predicament. This call of the contract would, perhaps, not be satisfied by proving, not that the land was *then willed* to *Rowland Madison*, but that it was *intended* to be *willed* to him; but it will be found, on the contrary, that the proofs do not even come up to this mark, in relation to the land in question. The contract not only contemplates a tract then *willed* to *Rowland Madison*, by the terms of it, but it also undoubtedly contemplates a *specific* tract, and not *any* tract which might thereafter be *willed*. This idea is kept up in that part which stipulates to make a title to "*the land*," first having "*both tracts*" *valued*, &c.; thereby evidently shewing that both parties had their eye upon a particular *specific* tract, the value of which they were not themselves competent to agree upon, and which, therefore, they left to others. They had in view a particular tract on the part of *Rowland Madison*, and not any tract of land which might thereafter be *willed* to him. The cases, therefore, which go to shew that possibilities may be passed under a general description, do not fit this case, in which the description is not *general*. The question still recurs, was the tract now in question the one contemplated by the parties in the contract?

It is admitted on all hands, that the tract now in question was not the land of *Rowland Madison* at the time of the contract. It is also admitted, that it was not *then* willed to him, as no other will is shewn than one made more than three years afterwards : but the case will be still stronger against the appellees, if it be shewn that this land was not, at the time of the contract, *intended* to be willed to *Rowland Madison*, but *another* tract, the destination of which was afterwards changed ; and which (and not this tract) was in the contemplation of the parties, when the contract was entered into, and provision made for the valuation thereof ; and this brings us to the proofs in the cause.

It is charged in the bill, that *John Madison*, the father, had "*intended to devise*" (not "*had devised*") the land in question, to *Rowland Madison*, as at the date of the contract, and that this intention was known to the family of *John Madison*, and others. The answer states, as upon belief, that, *at the time of the contract*, *William Madison* and *Rowland Madison* did not expect their father would devise *Voss's* to *Rowland Madison*, but the *lower* tract, which was afterwards devised to the appellees. This denial in the answer is abundantly supported by *Hugh Crockett*, who is admitted to be very respectable, was much confided in by the testator, and perhaps had better opportunities of knowing his sentiments, on this subject, than any other person. He says that the testator, in his life-time, *repeatedly informed him*, that it was his *intention* to give *Rowland Madison* the *lower* part of the tract of land called *Voss's*, and to *William Madison* the *upper* part ; and that, in consequence of this intention so expressed, *Rowland Madison* did actually plant fruit trees on the *lower* part ; that *afterwards*, shortly before the marriage of *Rowland Madison* with Miss *Lewis*, and *after the death* of *William Madison*, *John Madison*, the testator, expressed an *intention* of changing the disposition of the said tract, so as to give to *Rowland Madison* the *upper* part, (now in question,) and to give to *William Madison's* children the *lower* part. Nothing can be more conclusive

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than this deposition, (in aid of the answer,) to shew, that it was *after* the date of the contract, and also *after William Madison's* death, that the testator altered his intention, which, before, and at the time of, the contract, was to give the lower tract to *Rowland Madison*. That tract, therefore, and not the tract now in question, was the one which the parties contemplated by their contract, and which, in the alleged event, was to be *valued*. This deposition and answer is not materially impugned by any evidence in this case. Let us investigate, briefly, those parts of the testimony which have been arrayed against it, by one of the appellees' counsel. It has been supposed that the answer of the appellant, the bond of *December, 1789*, and the three depositions of *Gabriel Madison, George Madison, and Susanna Madison*, are all in opposition to the deposition of *Col. Crockett*, in this particular.

It was supposed, in the first place, that the answer of the appellant is in collision with *Crockett's* deposition. If that counsel was serious in this idea, he has viewed that answer through a very different medium from what I have done. There is nothing in it, in my judgment, which carries the semblance of such an idea. Again, he supposed that the bond of *December, 1789*, from *Rowland Madison* to *Andrew Lewis*, in which he contracts to convey "*Voss's*," willed to him by his father, to the said *Lewis*, was also in conflict with that deposition. Setting aside the testimony shewing that *John Madison's* intention, respecting this land, was *intermediately* changed, it is difficult to conceive how an admission that a tract of land was willed to a man, *on the 5th of December, 1789*, amounts to an admission that it was so willed, or intended to be willed, *on the 10th of October, 1780*. As to the deposition of *Gabriel Madison*, I can see nothing in it going, by any possibility, to shew that the testator, *on the 5th of December, 1789*, had willed, or intended to will, the land called *Voss's* to *Rowland Madison*. The same may be entirely said of that of *Susanna Madison*. There is, indeed, a general belief expressed by *George Madison*, that it was

understood in his father's family, that he intended to give *Voss's* to *Rowland Madison* : but this belief *might* have arisen in the mind of the witness at a time *posterior* to the date of the contract, (which appears from other testimony to have been the case,) and (even throwing this last consideration out of the case) is incompetent to outweigh the testimony of the answer, and that of *Hugh Crockett*, which is very clear, circumstantial, and express, as to this point, and who is accredited by this witness himself, as to his opportunities of knowing the facts to which he deposes, on account of his acknowledged intimacy with his father.

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It is, therefore, neither shewn that the tract of land in question was *willed* to *Rowland Madison* at the date of the contract, nor that it was then *intended to be willed* to him. The proofs on this point are entirely otherwise ; and that it was not until *after* the date of the contract in question, and after the death of *William Madison*, that "*John Madison's* intention was *changed* so as to *intend* to will *Voss's* to *Rowland Madison*, which intention he accordingly carried into effect. I will here make one general remark ; and that is, that all those parts of the answer, of the testimony, of the belief of the witnesses, or, even of that of the appellant himself, which seem to consider and admit the contract as applying to the land called *Voss's*, prove nothing, as to the fact, whether, *at the date of the contract*, that tract was the one contemplated by the parties, which, *if so proved*, would go to supply the deficiency of the contract in this particular. All these may have arisen upon mere report, or under a belief that the contract itself, when produced, or the testimony might go to supply that defect ; which, however, is not the case in the present instance.

My opinion therefore is, that the contract before us does not extend to *this* land, under any *general* expressions thereof ; but, on the other hand, extending only to a *particular* tract *willed*, or *intended to be willed*, to *Rowland Madison*, there is a defect of proof to bring the tract in question under that contract ; and that, to say the least, this fair and

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*bona fide* purchaser, for full price, should not be considered as a purchaser with notice; as the doctrines on this subject do not apply to vague and indefinite contracts; but in order to affect a purchaser with notice, there ought to be something to lead to a knowledge of the specific land contemplated; a point which, so far from existing in this case in favour of the purchaser, by the means of ordinary diligence on his part, is not even yet established, (as applicable to the land in question,) after all the care and pains of the appellees to collect testimony upon the subject.

This case, therefore, being, upon the merits, extremely clear for the appellant, in every respect, I am of opinion to reverse the decree, and dismiss the bill; and this without deciding (as being not necessary to be decided) whether other parties are necessary; though my present impression is, that they are so.

Judge FLEMING. This being a case of much solicitude and of considerable interest to the contending parties, I have examined the record with great attention; and though it seemed, at first view, not a little complicated, it appears to me, on a thorough investigation, a very plain case; and as it has been fully and ably discussed by the Judges who have preceded me, I shall briefly notice only what appears to me the most material points in the cause.

By the agreement 10th of *October*, 1780, between *William* and *Rowland Madison*, the latter (in lieu of 1,000 acres of land on *Boon's Creek*, belonging to *William*, which *Rowland* had sold to *Gordon*, and for which, by a former agreement, he was to give his land in *Botetourt* in exchange) was to make *William* a title to the same quantity of land, obtained by a military warrant, agreeable to his majesty's proclamation, and clear of any disputes whatsoever; but in case the said *Rowland* should not do this, he agrees that the first bargain shall be binding on him; "that when he comes to the possession of his land WILL TO

HIM, that he will make the said *William* a title for the land; first having both tracts valued," &c.

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This agreement was, no doubt, understood by, and binding between, the parties, and their respective representatives; but, even if it had been made public, and recorded in due time, it appears to be too vague and uncertain (no particular land being described therein) to affect any third person, and especially a fair purchaser for a valuable consideration, without the smallest notice of that, or any other agreement, between *William* and *Rowland Madison* being in existence.

It appears that the will of *John Madison*, the father, by which the land in controversy called *Voss's*, was devised to *Rowland*, was dated the 10th of *December*, 1783, more than three years after the date of the contract; and in which land the widow of the testator (who died before the month of *March*, 1784) had an estate for life. That *Rowland Madison* was resident in the State of *Kentucky* at the death of his father, and some years thereafter (probably on the death of his mother) returned to *Virginia* and settled on *Voss's*, where he resided several years; and in *December*, 1789, sold the land to the appellant for 2,000*l.* to whom he executed a bond in the penalty of 4,000*l.* to make him a title, on or before the 1st of *September*, 1790. After the purchase the appellant removed to, and settled on, *Voss's*, where he remained quietly until some time in the year 1792, when *Mrs. Elizabeth Madison* informed him of the contract between *William* and *Rowland Madison* as stated in the bill; which the appellant expressly swears in his answer was the first information he ever received concerning that contract; and this is strongly corroborated by the depositions of a number of respectable neighbours, in habits of great intimacy with the family, all of whom declare they never heard of such or any other contract between *William* and *Rowland Madison*. At the time the notice was given to the appellant, he had been, about two years, in quiet possession of the premises, had paid fifteen sixteenths of the purchase-



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money, and the other sixteenth was retained to satisfy an unliquidated debt due, in certificates, from *Rowland Madison* to one *Burford*, which he had assumed to pay, and afterwards did pay.

Soon after the sale of the land in question to *Lewis, Rowland Madison*, in the year 1790, removed to *Kentucky* (supposed then to have been clear of debt) with 18 or 20 likely negroes, three loaded wagons and teams, and other property.

It appears that *Gabriel Madison*, a brother of *William* and *Rowland*, was present at, and the only witness to, the aforesaid agreement. He was at the time possessed of 3,000 acres of military land lying in *Kentucky*, such as was therein described; out of which he agreed, in presence of the parties, to furnish *Rowland* with 1,000 acres, to satisfy the contract, of which 1,000 acres *William* was to make choice, out of the 3,000 acres aforesaid. He made choice of a tract of 1,000 acres on *Simpson's Creek*, and exchanged it with one *Craig* for a tract in *Montgomery County*, called *Hand's Meadow*; but, the title of the *Simpson's Creek* land being defective, the contract with *Craig* was cancelled; and *William Madison* soon after died, in the year 1782. And thus the matter rested until the year 1792; two years after *A. Lewis*, the appellant, had purchased and got possession of *Voss's*, the land in controversy; when *Mrs. Madison*, mother and guardian of the appellees, (for the first time as before noticed,) informed the appellant of the agreement between *William* and *Rowland Madison*; which for eleven years had been a secret, except to a few members of the family. It appears, too, from the deposition of *Gabriel Madison*, that, after the *Simpson's Creek* land was lost, he, in order to enable his brother *Rowland* to fulfil his contract with *William*, let him have 1,000 acres of land, of the same description, on the river *Ohio*; which, if conveyed to *William's* heirs, would have completely satisfied the contract; of which land it appears that *Rowland* was in possession, so late as the year 1795; and, after that period, sold the

same to *Walter Bell*, to whom *Gabriel Madison*, who had the legal title, was afterwards, by a decree of *Fayette County Court*, compelled to make a conveyance.

It appears also, by the deposition of *Gabriel Madison*, that several years before the sale to *Walter Bell*, he was written to by Colonel *Francis Preston*, another uncle of the appellees, in their behalf, requesting the deponent to inform him what he knew on the subject.

The deponent wrote Colonel *Preston* for answer, that he was ready to convey to *William Madison's* heirs the 1,000 acres of *Ohio* land, provided he could get *Rowland Madison's* release. And if proper steps had then, or for a year or two thereafter, been taken by the friends of the appellees, who were infants, a conveyance of the *Ohio* land would have been executed to them; the primary object of the contracting parties fulfilled; and an end put to this controversy. And it may be remembered, that the sole motive of changing the original agreement was to give to *Rowland Madison* the option of substituting 1,000 acres of *Kentucky* military land for the land he had in expectancy from his father, the identity of which was unknown to the contracting parties, and depended altogether upon a contingency that might never have taken place.

As to the omission of making the representatives of *Rowland Madison* parties to the suit, the appellant ought not to be affected by it. He has no claim upon them; and, I conceive, they have none upon him. He appears to be a fair purchaser, for a valuable consideration, without notice of any prior claim to the land in controversy, and ought to be quieted in the possession of his purchase. I am therefore of opinion, that the decree be reversed, and the bill dismissed with costs.

*By the whole Court.* Decree reversed, and bill dismissed with costs.

Monday,  
April 23.

# Hull against Cunningham's Executor.

1. Though land be sold in gross, for so much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency.

PETER HULL, the appellant, brought a suit in the Superior Court of Chancery for the Staunton District, against Robert Cunningham, sen. to be allowed a deduction from certain bonds for purchase-money, on account of a deficiency in land sold and conveyed. A title-bond, dated the 29th of January, 1796, bound the said Robert Cunningham to make to the said Peter Hull "a good and sufficient deed, in fee-simple, for a certain tract of land known by the name of Crab Bottom, lying in Pendleton County, said to contain 370 acres, be it more or less, clear of all encumbrances, on or before the first day of next August, to wit, all that tract left him by his father John Cunningham, deceased." The deed, executed the 2d of September, 1797, for the purpose of complying with the condition of this bond, was for the same tract of land, setting forth the boundaries according to certain deeds of lease and release, of record in Augusta County, from James Trimble and Sarah his wife to the defendant, dated the 17th and 18th days of August, 1761.

2 But if the purchaser do not (by eviction or otherwise) lose the land he expected to get; but make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for trouble therein, and actual costs of suit.

The bill charged that the plaintiff had rented the said plantation and tract of land from the defendant for several years before the purchase, and had then understood that all the improvements belonged thereto; that, before the bargain was concluded, the defendant, and the agent or person who, it was said, knew the lines, went upon the same with the plaintiff, and shewed him lines, which they said were the true lines, and which included all the buildings and improvements; which lines would appear by a plat, marked A., (dated June 20th, 1797, and exhibited with the bill,) containing 340 acres; that the defendant had made him a deed for what he expected was the whole of the land purchased, but which he found by a survey marked B. was only 258 acres; being 112 less than the quantity mentioned in the bond; leaving out ninety acres of the most valuable land

3. *Quere*, whether, in this case, an action at law could have been maintained upon the title-bond?

shewn to the plaintiff, and the dwelling-house and other improvements; that the plaintiff never would have purchased the said land had he known that the part to which the defendant had no title did not belong to the same. He therefore claimed a deduction from so much of the purchase-money as remained unpaid: and, by an *amended bill*, obtained an injunction to stay proceedings at law.

The defendant, in his answers to the original and amended bills, denied most expressly that he ever named *any certain* quantity of land; being unable to do so, from a variety of causes, which the complainant well knew; that the courses were procured and furnished by *himself* for the purpose of making him a deed. The defendant averred that he never was possessed of the courses or plat; that the deeds from *Trimble and wife* had been procured by his father to be made to him when he was very young; that he had been many years a prisoner with the *Indians*; that, being involved in a lawsuit, soon after his return, about *this* land, his papers were filed in the office of the General Court, where they were certainly lost or mislaid during the revolutionary war, so that he could never exactly ascertain the quantity of the land. He positively denied his ever having shewn the complainant any lines or boundaries; and declared that no bargain or purchase was ever made on, or within sixty miles thereof; that he lived at a great distance from the land, and received his only information respecting its value *from the complainant*, who lived, from his infancy, *near it*, (as well as, for some years previous to the purchase, *upon it*), and now holds lands *adjoining*; that the complainant had frequently proposed to buy the land of him, and came to his house and commenced the bargain, which was *finished* at a neighbour's house; that the words "more or less" were inserted, because the *defendant* was determined not to name any particular number of acres; "that the quantity of 370 acres was named (as the defendant verily believes) by the *complainant himself*, as it was thought proper to mention *some* number in the bond of conveyance; for which reason the words "*more*

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*or less*" were expressed, to shew *uncertainty with respect to quantity*; that, if the tract had contained *one thousand acres*, the complainant would have been entitled to the whole under the agreement, and was perfectly agreed and satisfied to receive the premises *sold*, at the price *agreed upon*." This answer stood unimpeached, and in many parts was supported by the evidence.

By a survey made in the cause, it appears that the lines expressed in the deed comprehend 270 acres. To this the surveyor annexed a plat, shewing the form of 90 acres of land which he surveyed for the plaintiff, *November 18th, 1797*, except a small triangle (amounting to four acres) which was excluded; and observed, that the boundaries thereof appear to be *ALL old marked corners*, and were supposed to be the boundaries of the lands formerly claimed by the defendant, amounting to 86 acres. The buildings sold by the defendant to the complainant were actually upon this part of the land. It appears that an entry was made by a neighbour for twenty acres of this part; that *Hull* purchased the right of the locator, made a farther entry for the residue, and, as it seems, obtained a patent for the whole, amounting (together with the small triangle of four acres) to 90 acres: notwithstanding which, he insisted that he ought not to be allowed for his *reasonable charges and trouble only*, but for the *actual value* of the land, or at least *pro rata*.

Such are the principal outlines of this case. The Chancellor (*July 30, 1804*) was of opinion, that "the plaintiff's relief is purely *equitable*, as it is believed that he could neither support an action on the agreement, nor deed, in the proceedings mentioned; but that the parties were *mistaken* in a material point cannot be doubted: had the plaintiff brought his bill to be *relieved* from his contract, and could the Court place the parties in the same situation in which they were before the contract took place, the mistake appears to be of sufficient magnitude to justify such a measure: but, inasmuch as the plaintiff has not prayed to be released

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from his contract, nor could the parties be placed in the situation in which they stood prior thereto; part of the defendant's lands and improvements, which he had held for many years, and which he might have continued to hold uninterrupted, (more especially, as, from the report of the surveyor, the boundaries of the lands, said to be vacant, appear to be *marked* as boundaries of the said defendant's claim, and, *as it may appear, originally were so,*) are now held by the plaintiff under a different title, the Court must endeavour to place the parties in the situation they must have stood, had no mistake taken place; which, it is presumed, is equally consonant with the principles of equity." The plaintiff was therefore directed to exhibit an account of his expenditures in procuring a title to the vacant lands, as also an account for his trouble therein, to be allowed him (when reported to the Court) *so far as reasonable*, together with his *actual costs* in prosecuting his suits. From this decree the plaintiff obtained an appeal, which, having abated by the death of *Cunningham*, was revived against his executor.

*Wickham*, for the appellant. The ground for the relief prayed for is, that land was sold to *Hull*, to which the vendor had no title. Both parties were ignorant of this circumstance. It was generally understood in the neighbourhood that the land in question was within the reputed boundaries; when, in fact, the most valuable part of the land was vacant, but was afterwards secured by *Hull*. The question then is, what is the proper *measure of relief*?

The Chancellor was mistaken in supposing that our remedy was *merely* equitable. I contend that *Hull*, by the terms of the bond, could have maintained an action *at law* upon it: the obligor being bound to make a "*sufficient deed in fee-simple* for a certain tract of land *left* him by his father." This could not be done without making a good title to the land, *as he claimed it under his father*, and as his father *held it*. Acceptance of the *deed* was no sa-

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*tisfaction of the bond*; for it is not proved to have been accepted as *full satisfaction*; without which, such acceptance could not be pleaded in bar. The deed was for *part* of the land; conveying no more than *Cunningham* was entitled to. This was only *part satisfaction*, which *Hull* had a right to receive, as such, and then to resort to his action for the residue.

If he had brought an action *at law*, the measure of damages would have been *the value of the land*. The same ought therefore to be the measure of *relief in equity*.

*Williams, contra.* From the evidence, it is clear that *Hull* knew more of the land than *Cunningham*, who relied on *Hull* alone. *Jolliffe v. Hite*(a) settled the principle that the original contract is to be the rule; and that, if the vendee buys at so much, *more or less*, he takes the risk upon himself. The same rule prevailed in *Pendleton v. Stuart*.(b) *Hull*, therefore, was entitled to no compensation; but if to any, certainly not to more than the Chancellor had given him. If he considered *Cunningham* bound to make good this land, he ought to have given him notice of the vacant land before he had perfected the title himself; and he should not demand an allowance of the full value of ninety acres, with all the improvements, for what cost him not more than ten dollars.

(a) 1 Call,  
301.

(b) MS. April,  
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*Wickham, in reply.* The distinction, between *this case* and *Jolliffe v. Hite* and *Pendleton v. Stuart*, is, that, in each of those cases, the purchaser got *all the land within the specified limits*: the deficiency was only in the number of acres. But here, *Hull* does not get the land within the limits by which he purchased: an important part of the land contracted for was not conveyed at all; being admitted not to be the property of the vendor.

As to *Cunningham's* not being acquainted with the lines; he certainly must have supposed the *houses and other improvements* to have been on the tract which he held, and

must have contemplated conveying *them* to the purchaser. *Nelson v. Matthews*,<sup>(a)</sup> and *Quesnel v. Woodlief*,<sup>(b)</sup> are conclusive authorities to shew that he was bound to make good the deficiency; since the boundaries expressed in his *own title papers* contained less than the *specified quantity*; and the words "*more or less*" do not cover so great a deficiency as that discovered in this case, but only a reasonable allowance for small errors in surveys, and variations in instruments." The measure of damages should be the *value of the land at the time of the contract*; according to the case of *Nelson v. Matthews*.

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(a) 2 H. & M.  
164.  
(b) *Ibid.* 174.

The smallness of the sum paid by *Hull* to save the land is a matter of no consequence. Suppose he had sued for the land, and been defeated, after spending one hundred pounds. He could not have recovered *that* sum, in addition to the value of the land. When, therefore, he has got the land for a smaller sum, *Cunningham* is not entitled to the benefit of his successful speculation.

April 28th, 1810. The Judges delivered their opinions.

Judge TUCKER (after stating the case) observed. This case in many of its circumstances so nearly resembles that of *Pendleton v. Stuart*, that the same reasons which governed in that case appear to apply to this, in part. In both, the purchaser had a much better opportunity of knowing the lands than the seller. Here the words of the bond do not amount to a warranty of the quantity; inasmuch as, in speaking thereof, there is this caution used; "SAID to contain 370 acres, BE IT *more or less*, to wit, "ALL that tract left him by his father *John Cunningham, deceased*." These circumstances indicate a contract *in gross*, and not by the specific number of acres. Neither the seller nor the buyer appears to have had access to any *title-deeds*. The old marked lines and corners noticed by the surveyor may have misled them both; or may, in fact, be the true lines of the original survey, or patent, lost or mislaid among



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the records of the General Court; and, if so, *Cunningham* was entitled, perhaps, to a patent for the surplus under the 46th section of the land-law. Be that as it may, here has been no *actual eviction* or expulsion of *Hull* from the lands not comprehended within the lines of *Cunningham's* deed. What then is the damage he has sustained? - Exactly what the Chancellor has supposed. Had he brought a suit at law upon the bond, after he had taken up and patented the lands, and thereby secured them to himself, a Jury could not have given him more than the Chancellor's decree probably allows him. Having elected to come into a Court of Equity, he certainly cannot have *vindictive* damages. Compensation for his trouble, and actual expenses in securing his title, seems to me to be the just measure that he is entitled to. Perhaps the decree ought to have directed that *Cunningham* should execute a release of the lands which he has taken up and patented; inasmuch as, by *possibility*, the original patent may be found, and the lines thereof comprehend the whole tract, which *Hull* now holds. But I lay no stress upon the omission, as that possibility seems very remote. Upon the whole, I think the decree ought to be affirmed, and the cause remanded to be proceeded on to a final decree, with this further direction, that *Hull* should be decreed to deliver up the title bond given him by *Cunningham*, and enjoined from bringing suit thereon.

A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing, also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk under. *en.*

Judge ROANE. The grounds of the decision of this Court in the case of *Pendleton v. Stuart*, are decisive of the present case, and even go beyond it. That was a judgment upon a written agreement, whereby *Stuart* agreed to sell *Pendleton* "1,100 acres of land, more or less," for 300*l.* A bill to enjoin the judgment was brought by the defendant, stating a *pro rata* sale, and also a deficiency of 160 acres appearing by an *ex parte* survey. There was no evidence, however, supporting the allegation of the bill, as to

the *pro rata* sale, or varying the contract as appearing upon the face of the written agreement. The bill of injunction was dismissed by the Chancellor, and his decree of dismissal affirmed, *pro tanto*, by this Court; though the same was *corrected* as to an omission in the decree, to provide for procuring a title to the land actually contained within the patent. One of the judges was of opinion, that, if the case had stood upon the written agreement merely, he should probably have been of opinion, on the authority of *Jolliffe v. Hite*,<sup>(a)</sup> to allow for the deficiency, as that deficiency was greater than was reasonably imputable to the variation of instruments; and this the rather, because the agreement was not to sell "*a tract of 1,100 acres,*" but to sell "*1,100 acres of land;*" but that the bill having asserted a *pro rata* sale, and the answer which was substantially responsive thereto, having stated a verbal communication, in which the buyer *agreed to take the risk upon himself*, (there being no contrary proof or circumstances,) he was of opinion to affirm the decree upon the merits. Another judge lays great stress upon the contiguity of *Pendleton's* residence to the land, and *his better* knowledge of the quantity than *Stuart's*; circumstances which emphatically exist in the case before us.

These principles are decisive of the present case, unless we say that a party is not as competent to take upon himself a risk, with respect to the manner in which the lines of a tract of land may run, as with respect to the actual number of acres contained in the tract. In the case before us it is fully proved, that that risk was taken upon himself by the appellant, and that there was no concealment, fraud, misrepresentation, or deception, on the part of the appellee. It is also evident, that the appellee was not only as ignorant of the actual lines of his tract, as the appellant, (and probably more so,) but sold the land *by the gross*, and was particularly careful not to lay himself responsible for any particular boundaries or number of acres. Unless, therefore, we are prepared to say, that it is immoral and inequitable for a man to pay, and another to receive, money

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Cunning-  
ham's Execu-  
tor.

(a) 1 Call,  
301.

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tor.

for more land than the one parts with and the other gets, under all possible circumstances whatsoever, (thus excluding the competency of a contracting party to take upon himself any risk as to lines and quantity,) a position that was negatived in the said decision of *Pendleton v. Stuart*, and by the opinion of Judge *Pendleton* and the Court in the said case of *Jolliffe v. Hite*, the appellee was entitled to recover the stipulated price in the case before us.

My opinion is, that the decree should be affirmed.

Judge FLEMING. This is a very plain case. The decree is right, and I am not for disturbing it.

Decree AFFIRMED by the unanimous opinion of the Court.\*

\* Note by the Reporter. From this and other cases it appears that, where a purchaser is entitled to relief in equity on the ground of a deficiency, the measure of relief depends upon circumstances. If the deficiency be very considerable, and the parties can be put in *statu quo*, the contract should be rescinded, if the purchaser request it. If the parties cannot be put in *statu quo*, or the purchaser do not apply for a rescission of the contract, an allowance should be made for the loss sustained; which allowance is, in general, the value of the land at the time of the contract, with lawful interest; (*Nelson v. Matthews*, 2 H. & M. 164.;) the purchase-money furnishing (as it seems) a proper standard of that value, where the actual value does not appear to be different; *Lowther v. The Commonwealth*, 1 H. & M. 201., and Judge Fleming's opinion, 2 H. & M. 179.; but it seems, the actual value, when appearing to be greater than the purchase-money, is to be allowed. *Nelson v. Matthews*, *Tucker's* and *Roane's* opinions, 2 H. & M. 175. and 177. In this case, the actual loss sustained by Hull being only his expenses and trouble in getting the patent, and actual costs of suit, the court allowed him no more; the circumstances of his case making it an exception to the general rule.

It seems from Judge Tucker's opinion in *Nelson v. Matthews*, 2 H. & M. 177., that if the purchase-money has been paid, and the purchaser be evicted by a superior title, the measure of relief is the value at the time of the eviction, and not at the time of the contract. But Chancellor Taylor, in *Lowther v. The Commonwealth*, 1 H. & M. 202., decided otherwise. *Ideo quære*.

In case of a deficiency in land purchased, the sum to be allowed as the actual value, is, in general, to be estimated by the average value per acre of the whole purchase, and not by the relative or intrinsic value of the part lost; (which rule may, however, be varied by circumstances;) 2 H. & M. p. 178.; but, in case of an eviction of part, the proper estimate of damages is the actual value of the part lost; *ibid*. p. 177.; in estimating which, I presume, its relative as well as intrinsic value, should be considered.

**CASES**  
**ARGUED AND DETERMINED**  
 IN THE  
**SUPREME COURT OF APPEALS**  
 OF  
**VIRGINIA:**

At the term commencing the first of October, 1810.

IN THE THIRTY-FIFTH YEAR OF THE COMMONWEALTH.

JUDGES, WILLIAM FLEMING, ESQUIRE, *President*,  
 SPENCER ROANE, ESQUIRE.  
 ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,  
 PHILIP NORBORNE NICHOLAS, ESQUIRE.

Templeman, Executor of Steptoe, *against* Steptoe  
 and others.

*Monday,*  
*October 8.*

THIS was a suit originally brought in the late High Court of Chancery by *James Steptoe* and others, relations

rate subjects in controversy, and as to the *other*, determining also the rights of the parties, *but directing an account to be taken*, is not final in any respect, between the parties retained in Court, and their legal representatives; but subject to revision and alteration in every part, at any time before a final decree; without the necessity of a bill of review.

2. *Quere*, in such case, whether any subsequent decree could affect the rights of *bona fide purchasers* of property as to which the bill was dismissed?

3. Construction of the 5th, 6th, and 7th sections of the act "to reduce into one the several acts directing the course of descents." Where an *infant*, having title to a *real estate* of inheritance derived by purchase or descent *immediately* from the *father*, dies without issue, and with no brother or sister, or descendant of either; the father being dead, but the *mother living*; the right of inheritance is not in *abeyance*, but goes in *parcenary* to the brothers and sisters of the *father*, or their lineal descendants: and, *vice versa*, such estate being derived *immediately* from the *mother*; and *she* being dead, but the *father living*; it goes in *parcenary* to *her* brothers and sisters, or their lineal descendants.

4. The law was the same as to *personal estate*, between the 1st of October, 1793, and the 22d of January, 1802.

Manford.  
 1m 339  
 94 681

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(on the part of the father) of *Edward Septoe*, an *infant*, (who died intestate, unmarried, and without issue, on the 24th of May, 1794,) against *Elizabeth Septoe*, his mother, and *William Septoe*, his paternal uncle; executrix and executor of *George Septoe*, his father, for an account and division of certain property, *real* and *personal*, of which he the said *Edward Septoe* died seised and possessed, as his absolute estate, *derived immediately from his father*. The great questions in dispute were, 1st. The same with that decided in *Tomlinson v. Dilliard*, 3 Call, 120. and *ante*, p. 183. viz. whether *Elizabeth Septoe*, the mother, was excluded from succeeding to *such personal* as well as *real* estate; and, 2dly. If she was excluded, whether the plaintiffs and the defendant *William Septoe* were entitled to take the said real and personal estate; there being no brother or sister of the *infant*, nor any descendant of either. The defendant, *Elizabeth Septoe*, in her answer, observed, that "if she had a right to her son's estate, *some of her near connections* might be benefited by it;" but did not mention who they were; and nothing farther appears in the record to shew the names or degrees of consanguinity of *her* relations.

The plaintiffs were *James Septoe*, (a brother, of the *whole blood*, to *George Septoe*, the father,) and the *descendants* of four sisters, of the *half blood*, to the said *George Septoe*. The defendant, *William Septoe*, was also a brother of the *whole blood*.

The facts in the case were generally agreed by the parties; and, on the 17th of *March*, 1797, the cause came on to be heard; when the Court, "being of opinion that the plaintiffs were not entitled to any part of the *slaves* and *personal* estate" in question, "adjudged, ordered, and decreed, that the bill, as to the part thereof which claimed the said *slaves* and *personal* estate, and demanded an account of the administration thereof, be *dismissed*; but the Court was of opinion that, by the 5th, 6th, 7th, and 14th sections of the act to reduce into one the several acts directing the course of descents, the defendant *Elizabeth* was excluded from succession to the *real* estate;" and that the same descended

to the plaintiffs and the defendant, *William Steptoe*, in certain proportions specified in the decree. Commissioners were therefore appointed to state accounts of the said *real estate*, and of the profits thereof since the death of the said *Edward Steptoe*; to allot the same, according to the said proportions, (subject to the defendant *Elizabeth's* right of dower,) and to report the said accounts and allotments to the Court.

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After this, (the late High Court of Chancery having been divided by the act of *January 23, 1802*) (a) a bill was exhibited to the Superior Court of Chancery for the *Williamsburg* District, on behalf of the same plaintiffs and others omitted in the former bill, and of the widow and children of the former defendant, *William Steptoe*, (who now were *plaintiffs*;) setting forth the former proceedings in the original suit, "which by this bill was sought to be *revived*," and stating that "before any further proceedings were had in the said cause, or upon the said *interlocutory* decree, the said *Elizabeth Steptoe* and *William Steptoe* had both died, (the said *Elizabeth* between the 16th of *April* and 13th of *February*, in the year 1802, and the said *William* in *April*, 1803,) whereby the said suit and all proceedings thereon became abated;" that *Samuel Templeman* was executor of *Elizabeth's Steptoe*, and, as such, had possessed himself of all the real and personal estate of which *Edward Steptoe* died seised and possessed; and that *William Steptoe* had died intestate. The plaintiffs had been advised that, "so long as a decree remains *interlocutory* it is amendable by the judge who pronounced it; and that the decree above mentioned was amendable by the present judge, to whom all the powers respecting it, which that judge had, were transferred by legislative authority. They had also been advised that, according to the true exposition of the acts of Assembly severally entitled, "An act to reduce into one the several acts directing the course of descents," and "An act reducing into one the several acts concerning wills, the distribution of intestates' estates, and the duty of executors and administrators," (b) "the same were

(a) 1 *Rev.*  
*Code*, p. 426.

(b) 1 *Rev.*  
*Code*, p. 164.  
s. 27.

in opposition to that part of the said decree which tended to

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deprive them of the surplus of the *slaves* and *personal estate* late of *Edward Steptoe* aforesaid, deceased, which exceeded the funeral expenses, the debts and all other just expenses chargeable on the said estate." They therefore prayed "the benefit of all the proceedings in the original suit, except the said *interlocutory decree*, which ought to be set aside, partly for *error apparent on the face of it*, and partly because the execution of certain parts of it had become impossible;" that the said *Samuel Templeman*, "being in possession of all the books of accounts of the said *Elizabeth Steptoe*, should render an account of her administration of the estate of *George Steptoe*, and of her receipts and expenditures out of the estate of her infant son *Edward Steptoe*, derived to him from the said *George*, together with the receipts and expenditures of the said *Samuel* out of the said estates, since they came into his hands; and the amount and particulars of which they severally consist; and that a writ of *subpana*, to *revive and answer*, be directed to the said *Samuel Templeman*, executor as aforesaid," &c.

To so much of this bill as claimed the *slaves* and other *personal estate*, the defendant *pleaded, in bar, the decree of March 17th, 1797*, which, as to those subjects, he contended was *final*; alleging that he "was proceeding to execute the provisions contained in the will of his testatrix, when he was arrested by a notice of the complainants' claim, very unexpectedly; for, from the *length of time* which had elapsed since the said *final* decree, he had thought that the complainants, perceiving the weakness of their title, had *acquiesced in the decision*, and no longer insisted on their right to the said *slaves* and *personal estate*: since that period this defendant had hired out the *slaves* whereof his testatrix was seised at the time of her death, and was ready to give an account of the same, and of their hires, if the Court should so decree." As to the other matters, he *answered*, and said that the Commissioners had assigned "to the said *Elizabeth Steptoe* her *dower* in the real estate of inheritance whereof *Edward Steptoe*, her infant son, was seised at the

time of his death, and to which she became entitled at the death of her husband *George Steptoe*, but had not proceeded to state an account of all the said real estate, or to allot the same to the parties mentioned in the decree, agreeably to the proportions therein established; because the parties entitled to the said real estate of inheritance were most of them infants, and had no representatives known to the Commissioners; and because other difficulties afterwards occurred, (such as the death of some of the Commissioners,) neither did the said Commissioners settle and adjust an account (as they were directed in the said decree) of the profits of the real estate since the death of the said *Edward Steptoe*, because, upon investigation, they found that *no profits* accrued therefrom; that, *after the allotment of her dower*, the said *Elizabeth Steptoe* had nothing to do with the residue of the said real estate, but it remained subject to the disposal of the parties entitled thereto; and that the defendant had never interfered with, nor received any profits of, the real estate of which *Edward Steptoe* died seised."

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The plaintiffs filed a special replication to the *plea* of the defendant; in which they deny that the decree of *March, 1797*, was *final* in any respect; especially because "it could not have been signed and enrolled agreeably to the language formerly spoken in Courts of Equity, and did not authorize the clerk of that Court to enter all the pleadings in the suit and other matters relating thereto, together, in a book to be kept for that purpose, according to the act of Assembly, in that case made and provided, entitled "An act reducing into one the several acts concerning the High Court of Chancery."(a)

On the 8th of *November, 1805*, "the cause came on to be heard on the bill, *supplementary bill*, the answer of *Elizabeth Steptoe and William Steptoe*, in their life-times, the plea and answer of the present defendant, the replication thereto, the exhibits, and was argued by counsel; on consideration whereof, the Court overruled the said plea, and was of opinion that all the real and personal estates of *Edward*

(a) 1 *Rev. Code*, p. 67. s. 49.



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*Stephoe*, which came to him from, or through his father *George Steptoe*, became divisible among his relations on the part of his father; his mother, though then alive, and her relations on her part, being entitled to no share or proportion thereof. It further appearing that the said infant, *Edward Steptoe*, at the time of his death, left two uncles of the full blood, and the descendants of four aunts of the half blood, on the part of his father *George Steptoe*, deceased," (plaintiffs in this suit,) the Court was of opinion, and decreed, "that the real estate, the slaves and all the other personal estate whereof the said *Edward Steptoe* died seised or possessed, in possession, reversion or remainder, whereunto he derived title from or through his father *George Steptoe* aforesaid, as well as the rents, issues, and profits thereof since his death, be divided, by Commissioners, into eight equal parts; that two such parts, or one fourth of the whole, be by them allotted to the said *James Steptoe*; other two eighths, or one fourth, to the family of *William Steptoe*, deceased;" and one eighth to the descendants of each of the four aunts aforesaid; according to certain proportions, specified in the decree. It was also ordered, that the defendant settle an account, before the said Commissioners, of the said *Elizabeth Steptoe's* administration of *George Steptoe's* estate, and of her receipts and expenditures of the estate of her infant son *Edward*, derived to him from his father; and also an account of his own receipts and expenditures of the said *Edward Steptoe's* said estate." And, on the prayer of the defendant, an appeal was granted him from the said decree.\*

*Wickham*, for the appellant. The case of *Tomlinson v. Dilliard*, precludes my making a point I intended; that the Chancellor's decree of *March, 1797*, was right, so far as it

\**Note.* This appeal (being from an *interlocutory* decree) was granted by virtue of the discretionary power vested in the Chancellor by the act "enlarging the right of appeal in certain cases," passed the 23d of *January, 1798*. See 1 *Rev. Code*, p. 375.

respected the *personal* estate. I will substitute another ; that, during the life of *Edward Steptoe's* mother, the right of inheritance was in *abeyance*.(a)

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But, whether right or wrong, that decree was *final* as to the *personal* estate. The claim of partition of the *real* estate was entirely distinct from that for division of the *personal*. The widow, as *executrix*, had nothing to do with the land. I do not deny that several *distinct* claims may be included in one bill ; but, where such is the case, if the Court dismiss the bill as to *one* of those claims, the parties are out of Court as to *that*. The decree was therefore *final*; and, of course, the bill now in question is a bill of *review*.

(a) 2 Tru. Bl.  
App. 28—42.

But, being a bill of *review*, it was not filed within the *time* the law requires. Though *when* it was filed is not *precisely* stated in the record, it sufficiently appears to have been more than *five* years after the date of the decree ; and this length of time, by analogy to the law relating to writs of *superse-  
deas*,(b) is a bar to a *bill of review*. The rules in Courts of Equity concerning limitations of suits are framed by analogy to those which govern the Courts of common law. In *England* the time within which a *writ of error* may be brought is, by an act of parliament, *twenty* years. The Court of Chancery, therefore, will not permit a *bill of review* to be brought after *twenty* years ;(c) which are to be computed not from the time of the enrolment, but from the time of pronouncing the decree. Applying the same principle to this country, the limitation here, on bills of review, should be *five* years ; that being the limitation upon writs of error or *supersedeas*, by our act of Assembly. If, in this case, there were *infant* plaintiffs, not barred by the limitation, *others* had certainly no excuse : and, if their rights are *joint*, (which, in my opinion, they are not,) the disability of those who are of full age, to prosecute the bill, might subject the infants to the same disability.

(b) 1 Rev.  
Code, p. 82. s.  
52.

(c) Coop. Eq.  
92, 93. and  
the cases there  
cited, particu-  
larly *Edwards  
v. Carroll*, 5  
Bro. Parl.  
Cas. 466. and  
*Smith v Clay*,  
3 Bro Ch.  
Cas. 639. in  
note, and  
*Ambl.* 645. S.  
C.

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Warden, contra, relied on the cases of *Grymes v. Pendleton*, (a) *M'Call v. Peachy*, (b) *Fairfax v. Muse's Ex'rs*, and *The President and Professors of William and Mary College v. Hodgson and others*, (c) as cases in which it was repeatedly decided, that a decree is not final when any thing remains to be done. In this case the Chancellor might, on the *final argument*, (even without any supplemental bill,) have set the decree aside as to the personal estate. The bill could therefore be considered only as a bill of *revivor*, rendered necessary by Mrs. Steptoe's death. But, if it was a bill of *review*, there is no law of limitation upon that subject in this country. The 52d section of the District Court law relates only to writs of *supersedeas* or error to judgments of inferior Courts; between which, and bills of *review*, granted by a superior Court to its own decrees, there is no analogy.

(a) 1 *Call*, 54.  
(b) *Ib.* 55.  
(c) 2 *H. & M.* 557.

Judge ROANE referred to *Gaskins v. The Common-*  
(d) 1 *Call*, *wealth*, (d) as having established a contrary doctrine.  
194.

Warden. I do not recollect that case. But, at any rate, the rights of *infants* are saved. It appears that many of the plaintiffs were infants when this bill was filed; and, I believe, a considerable part are infants *now*. How could those of age (where the parties were so numerous, and some of them *infants*) have brought their bill of review without making them all parties? The whole must be considered as bringing their suit together; because all persons interested must be parties.

As to the question of *abeyance*, Judge TUCKER, in his note to 2 *Bl.* p. 107. has referred us to *Fearne*, 513. and 526. which shew that, in a case of this kind, the estate could never have been in *abeyance*; for that cannot happen unless there be *no heir known*. Is there any resemblance between *this* case, and either of those stated by *Blackstone*?

*Williams*, on the same side, quoted the 49th section of the Chancery law,<sup>(a)</sup> to shew what the legislature considered a final decree. If the decree of *March*, 1797, was *final*, the Clerk ought to have recorded all the papers. Yet the cause remained on the docket. There might be twenty records of the same case, if dismissal as to *part* should be considered as *final*. In *Grymes v. Pendleton*,\* there was such a decree as this, though not inserted in the report of the case: yet it was decided to be *interlocutory* only. But if this point be against me, the decree was nevertheless correct. It is not at all important that Courts of Equity have, by analogy, adopted the rules of limitation at law; for, if so, the analogy must hold throughout. The act of limitations must be *pleaded*; which is not the case here. So in *Hite's Heirs v. Wilson and Dunlap*,<sup>(b)</sup> this Court decided that a *release of errors* must be *pleaded*.

As to the right of inheritance being said to be in *abeyance*, the question is raised on the 7th section of the act of descents.<sup>(c)</sup> But the case of *Brown v. Turberville*,<sup>(d)</sup> settled that question as to an *adult*: and, from the opinions of the Judges there pronounced, it appears that the 5th and 6th sections ought to be construed as disposing of the estate in the case of an *infant*, so that, where the *mother* is excluded from inheriting, it shall go to the brothers and sisters, or their descendants, of such infant, on the part of the *father*; or, if there be none, then to the brothers and sisters of the *father*, or their descendants. But I do not consider this

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in the replica-  
tion, ante.  
1 Rev. Code,  
p. 67.(b) 2 H. & M.  
268.(c) 1 Rev.  
Code, p. 169.  
(d) 2 Call,  
390.

\**Note.* It appears from the record in the case of *Grymes and others v. Pendleton and Lyons, Administrators of John Robinson*, deceased, that the Chancellor's decree, (pronounced the 26th of September, 1793,) after ascertaining the sum to which the plaintiffs were entitled, subjecting the unadministered *personal* estates of *Philip Grymes* and *Presley Thornton* to satisfy the same, and directing an *account* of the said *personal* estates to be taken by a Commissioner, "dismissed so much of the bill of the plaintiffs as sought to subject to their demand the *real estates* of the defendants derived from their ancestors and testators." From this decree the *defendants* prayed an appeal, which was granted by the Court of Chancery, but dismissed by the Court of Appeals at *October* term, 1797, and the cause remanded for farther proceedings.

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question important *in this case*; there being no proof in the record that there are any *maternal kindred*. By the 14th section, then, if there be no kindred on one side, the whole must go to the other.

*Call, on the same side*, to shew that the appellant could not avail himself of the act of limitations, since it had not been *pleaded*, cited *Coop. Eq.* 304. and 2 *Vez. sen.* 109. *Gregor v. Molesworth*. In 1 *Bro. Parl. Cas.* 96. *Sherrington v. Smith*, a *demurrer* was allowed on the ground of length of time: but it appears, from the report of the case, that the *equitable bar was set up in the demurrer*; and, according to *Pryor v. Adams*,<sup>(a)</sup> the *form* is unimportant, whether by *plea* or *demurrer*; provided the fact be *stated*, and *relied upon as a bar*. But, here, it was neither pleaded nor relied upon. Mr. *Wickham's* argument, that *adults* may be barred while *infants* are not, is not applicable to this case; the decree being *entire* and *joint*, though the respective *proportions* of the plaintiffs are several. The only case where (an *adult* and *infant* being joined in a *judgment*) one is bound, and the other not, is that of a *fine*, or common *recovery*; but those are considered as *conveyances*; and the *adult* is bound by his *conveyance*. A *joint judgment*, *naught in part is naught in all*.<sup>(b)</sup>

<sup>(b)</sup> *Styles*,  
480. 406.

The decree here is joint to every intent and purpose. A reversal, then, as to the *infants*, must enure to the benefit of the *adults*. But, *in equity*, as the bar by the act of limitations arises only from *analogy*, it is regulated by the sound discretion of the Court, according to the circumstances of each case.<sup>(c)</sup>

<sup>(c)</sup> *Wyatt's*  
*Pr. Reg.* 307.  
3 *P. Wms.* 8.  
*Mills v.*  
*Banks*, 1 *Vez.*  
*sen.* 206. *Kemp*  
*v. Squire*. 1  
*Sch. & Lef.*  
413. *Bond v.*  
*Hopkins*.

For example, the rule *at law* that, where the act begins to run, it does not stop, though descents to *infants* or *femes covert* intervene, is not permitted to operate, *in equity*, to their *injury*, though it may to their *benefit*. But

2. The decree of *March, 1797*, was *not final*; for a final decree is that only which puts an end to the cause, and puts it off the docket. The reasoning of the Court in *Metcalf's*

case,(a) shews what is a final judgment at common law ; and may, by analogy, be applied to the question concerning what constitutes a final decree. It is there said, that "a writ of error shall rehear all which be parties to the original writ;" which shews that a writ of error brings up the whole case, though there may have been judgments as to part from time to time. The same doctrine is recognised in Courts of Equity. In *Ormston v. Hamilton*,(b) a decree, in Scotland, for part, was considered there as a final decree, but reversed in the House of Lords on that ground. What is the difference between a decree for part in favour of the plaintiff, (which is ever considered not final,) and a decree dismissing his bill as to part? Surely if in one case it be not final, neither is it so in the other. In *Grymes v. Pendleton* (before cited) there was a decree as to part: yet the whole decree was decided to be not final, and the whole cause was sent back for farther proceedings; on the ground that the appeal was premature. If the Court considered any part of that decree final, why did they not affirm that part?

The decree then not being final, a bill of review was unnecessary and improper. In *Triplett v. Dunlop*, (MS.) this Court have decided that there cannot be a bill of review to an interlocutory decree.\* In England, there may be a rehearing at any time before enrolment; and there the practice is to obtain it by petition. Until the cause is matured, so as that the Clerk should record the papers, the rule here is the same as in England before enrolment: but the practice is by motion.

3. On the merits of the last decree. The difficulties suggested have arisen from the fallacy of considering the 5th and 6th sections of the act of descents as disposing or donative clauses, when, in fact, they are only excepting clauses; excepting, in a certain event, a certain description

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(a) 11 Co. 39.

(b) 8 Bro.  
Parl. Cas. 364.

\* Note. See also *Ellzey v. Lane's Executrix*, 2 H. & M. 589.

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of persons. Every *other* person is left to take precisely as if those exceptions did not exist. The 7th section is predicated upon the *non-existence* of the *mother, brothers, &c.*; but the effect is the same as if there were *no mother*; there being *none capable of taking*. The act of 1785 destroyed the common law rule of resorting to the blood of the first purchaser: that of 1790, c. 13. restored it *sub modo*. The question then is, always, whether there be a person of that blood which is heritable.

Let us suppose that a citizen dies leaving an *alien* brother. The words of the section are, "if there be no mother, nor *brother*," &c.: but, in fact, there *is a brother*, though not entitled to inherit. What then is to become of the estate? The answer should be, "the case is precisely the same as if there were *no brother*." The case of a *half* brother before the act of 1785 was similar to this. Monstrous consequences would follow from a contrary doctrine: a multitude of cases would exist in which there would be no canon of descents.

The right of inheritance can never be in *abeyance* in a case like this. The rule is universal that there must be a tenant to the *præcipe*: otherwise, there can be no *abeyance*. While the freehold is in *abeyance*, some person must hold. But here no person can hold, but as *heir* under the act of Assembly: and, if there be no heir, it must go to the Commonwealth.

But the doctrines laid down by the Judges in their several opinions pronounced in the case of *Brown v. Turberville*, 2 Call, 390. are amply sufficient to remove all these difficulties; either by considering the act of 1785 as still in force, where not repealed by the act of 1792;(a) or by construing the last-mentioned act according to its evident spirit and meaning;(b) or by taking the whole of that act, and all other acts made on the same subject, into one view, and moulding them so as to effectuate the *intention* of the legislature.(c) And this decree is right, if either of those modes of construction be adopted.

(a) See Judge Fleming's opinion, 2 Call, 397—400.

(b) See Judge Carrington's opinion, *ib.* 401, 402.

(c) See Judge Lyons' opinion, *ib.* 403, and Judge Pendleton's, *ib.* 404—408.

*Wirt*, in reply. 1. The decree of *March*, 1797, was final OCTOBER,  
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as to the *personal estate*; being a decree which absolutely Templeman  
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decided the right, and left nothing farther to be done. (a) There was no condition to *shew cause* against it; no fact left open for a *fury* to try; and no reference to a *Commissioner*. On the contrary the bill was *dismissed* on a hearing, (a) 2 *Fowler's*  
*Exc. Pr.* 195.  
and the cause, as to this subject, out of Court. We admit it is still in Court as to the *real estate*; and, so far, the decree is merely interlocutory. But there is no weight in that circumstance, unless our adversaries establish the proposition that a decree cannot be final as to any party or any branch of a subject, as long as there shall be a party or any remnant of a subject in Court.

The constant practice of this country disproves the proposition. Whenever a cause comes on, regularly matured for a final hearing, our Courts dismiss *any defendant* who, they may be convinced, ought not to be before the Court, or any *subject* of the controversy which they are satisfied ought not to be detained and suspended in Court. The inconvenience and absurdity of a contrary practice is evident; since it would occasion, 1. The detention of a multitude of parties for the default of *one*; in which they are in no wise implicated, and for which, from the nature of the case, they cannot be responsible; and, 2. The unnecessary detention of a distinct estate in Court, which, the Court shall be satisfied, can in no event be changed by a suit.

Let us suppose the case of a suit brought against several persons as distributees of an estate, and claiming, of each of them, specific negroes by name. The suit comes on for final hearing; and the Court are satisfied that one of the persons charged as a *distributee* is in fact *not one*, and in no wise liable to the claim; but that the other defendants are liable, and that multifarious accounts are to be settled, which threaten a long, troublesome, and vexatious contest. Must the innocent defendant be kept in Court? or may the Court dismiss the bill as to him? They may: they do: and, as to him, such dismissal is final: and, if so, it follows that



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a decree in part may be final, and yet another part of the cause remain in Court.

Again suppose, in the case put, the Court should be of opinion that, as to certain *slaves* charged by the bill to have been received by one of the defendants as a distributee, they were acquired by purchase from a different quarter, and never had any connection with the estate? Must those slaves be kept in Court for twenty years, and their owner's hands tied, till the other branches of the cause are decided? Reason, right, and practice are otherwise. The bill may be dismissed *as to them*; and, from that day, they are out of Court, and their owner's hands untied.

Suppose, again, a debt attempted to be charged in Chancery upon the *heirs* and *executors* of a man; being different persons; and the Court should be of opinion that the *heirs* were not liable, (from the nature of the debt, or because they had received no portion of the estate,) but the *executors* were: must the *heirs* be still kept in Court? Or, if it should appear that the personal estate was fairly exhausted, or demanded for payment of simple contract debts, but that the land was liable to the claim; might they not discharge the *executors*, and detain the *heirs*?

So, here, the plaintiffs demand the real and personal estate: the cause is matured for a hearing, and comes on for that purpose fully before the Court: and the Judge is of opinion that the plaintiffs have no right to the personal estate; and, as to that subject, dismisses the bill. The decree is final.

If, in *March*, 1797, when the decree was pronounced, *Elizabeth Steptoe* had held *only the personal estate*, as *administratrix* to her son; and *other persons* calling themselves *heirs* had held the *real estate*; and the Chancellor had given this opinion, dismissing the cause *as to her* and the subject in her hands; would she not have been out of Court? Would the pendency of a different and distinct claim against others have operated to keep her in Court, after she had been dismissed? Might she not, in such case, consider herself as discharged, and act accordingly; selling and adminis-

tering the estate? Would a purchaser under her, after such dismission, be deemed a *lite pendente* purchaser, and forced to refund the property? Could the Court proceed to decree any thing against the party so dismissed, without the notice of new process? Those who hold the affirmative of these propositions, must find a new dictionary of the *English* language, and shew, by it, that an *absolute decision of a right* means the *expression of a doubt*, and to *dismiss* a party out of Court means to *keep him in it*.

If, then, the decree would be final, where the heirs and administratrix are *different* persons, does it make any odds that the two rights concur in the *same* person? The *subjects* are in their nature *distinct*, *real* and *personal*, capable of being the subject of distinct suits, and held by different persons. The *characters* in which they are held are distinct; as *heir* and *administratrix*; their functions distinct; their responsibilities distinct. And the maxim is, that, when two distinct rights concur in the same person, they are regarded by the law in the same light as if they were in different persons. The opinion of the Judge treats the subjects and characters as distinct; the expression of opinion as to the right is just as absolute, and the terms of dismission as strong, as if the persons were different; and those expressions and terms of dismission must mean the same thing as if the persons were different. The effect of the decree of dismission is the same as to the rights of the administratrix and of purchasers.

But the decisions of this Court are relied upon as establishing the doctrine that a decree is not final, until all the parts of a cause are disposed of, and all the parties out of Court.

The cases of *McCall v. Peachy*,<sup>(a)</sup> *Fairfax v. Muse*,<sup>(b)</sup> and the *President and Professors of William and Mary College v. Hodgson*,<sup>(c)</sup> were all cases where the subjects in controversy and the decrees were of a totally different character from that now in question. In each of those cases, the subject was *one*; not only incapable of being held by different persons, but incapable of division; much more of distinct

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<sup>(a)</sup> 1 Call, 55.  
<sup>(b)</sup> 2 H & M.  
<sup>(c)</sup> Ibid.

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suits. The decrees were not, as here, decrees of *dismissal*, but of satisfaction of debts in part. We defy the counsel on the other side to produce a case where, in a suit claiming two subjects in their nature distinct, a decree, absolutely deciding the right as to one of them against the plaintiff, and dismissing the bill as to that, has been held interlocutory *quoad hoc*.

- (a) 1 *Call*, 54. The appeal in the case of *Grymes v. Pendleton*, (a) (as will be seen by reference to the original record,) did not present the question whether that part of the decree which dismissed the bill as to one of its objects was or was not final. The *defendants* (who were the appellants) could not complain of that part of the decree which made *in their favour*; as has been frequently settled in this Court. The other part, therefore, which was *against them*, could alone be drawn in question upon *their* appeal; and that part was clearly interlocutory. If the *plaintiffs* had appealed from the decree dismissing the bill as to the land, *they* might have raised the question whether this branch of the decree was or was not final: and if, *on their appeal*, it had been adjudged interlocutory, there might have been some colour for the argument on the other side.

Mr. *Call*, aware of this obvious answer to the argument drawn from that case, has asked, "if the Court considered any part of that decree final, why did they not *affirm that part*?" Because there was no party before them authorized to ask it. The *appellants* had no right to ask an affirmance; nor had the appellees, who represented the *personal estates* of *Grymes* and *Thornton*, any interest in, or right to, the *real estates*. The question then was not raised. By the mere appeal of the *defendants*, they were not called on to consider any part of the decree in their favour. Why then should the Court have *affirmed* it

(b) 1 *Rev. Code*, p. 67.

The 49th section of the Chancery law, (b) furnishes no argument to shew that this was not a final decree. The object of that section is only, "for the more entire and better preservation of the records of the Court," to impose a

certain duty on the Clerk when a cause is *finally determined in all its parts*. But it does not declare *what is a final DECREE*; for no such phrase occurs in the section. Indeed the "*final determination*," there intended, is always understood as not taking place till after the decision of this Court upon the *appeal from the final decree*; for not until then does the Clerk of the Court of Chancery record the papers. The Clerk's recording the papers gives *no new* authority to the decree: the pleadings thus made out are never *signed by the Judge*. The decree is perfect before; this book being merely for safe keeping. Nor is the enrolment, in *England*, an act which at all changes the nature of the decree, as to its being final or interlocutory: for, if it did, as the bill of review lies only after the final decree, the time which runs against it would run from the *enrolment*; whereas it is counted from the *time of pronouncing* the decree. (a) *In-* (a) *Coop. Eq.*  
*deed enrolment* "is now much disused." (b) So that the 92. *Ibid. 73.*  
 final nature of the decree, in *England*, is decided by its terms, its intrinsic character, and not any *formality* used in relation to it. And in this country the rule is the same: or if any act, equivalent to the enrolment in *England*, were requisite to complete the final character of a decree, it is found in this, that the record of each day's proceedings is regularly drawn up by the Clerk and signed by the Judge. In *Metcalf's case* (c) there was a judgment *quod computet*; (c) 11 Co. 39. which clearly was not final; and no writ of error lay till after judgment on the account; as was evident from the very form of the writ: (d) but that case has no resemblance to this. (d) *Ibid. 38.b.*  
*Ormston v. Hamilton* (e) is a short note in the index, in these (e) 8 Bro. 364.  
 words: "Decree, in *Scotland*, taken for part of a demand, with reservation of the other part not determined. Decreed *there* that it was *lis finita*; but *reversed*." The case itself is not reported in the book: but this little shews clearly that it has nothing to do with this argument. It was determined in *Scotland*, not that such a decree was final *pro tanto*; but that it finished the whole controversy; and the lords very rightly determined that it did not. So that the position re-

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mains untouched, that this decree, deciding against the right of the plaintiffs to the personal property, and dismissing the bill as to that subject, was *so far final*. If so, the controversy is at an end as to *Templeman*, the only defendant now before the Court, who, as *executor of Elizabeth Steptoe*, is interested in maintaining no other part of the decree of 1797: for he is protected by a final decree, unreversed, and unappealed from, and which, in fact, no proceeding has ever been instituted to affect. Mr. *Wickham*, willing to place this case on the most liberal ground for the plaintiffs, considered their last bill as a bill of *review*. They disclaim it, and call it a bill of *revivor*; and rightfully, I incline to think: and, if a bill of *revivor*, it cannot reach this part of the decree; but only those proceedings which *were alive* but *abated* by the deaths of the defendants. The plea and replication do not consider this as a bill of *review*. The parties join issue upon the point whether the decree of 1797 was final as to the personal estate; and the Chancellor on this issue overrules the plea; thereby deciding that it was not final but interlocutory. This we say is an error; and, if so, the case is with us.

2. But if the bill against *Templeman* is to be considered as a bill of *review*, it is too late, according to the authorities heretofore cited; to which add *Cook v. Arnham*.(a)

(a) 3 P.  
Wms. 287.

But it is said that we ought to have *pleaded* the limitation; and the authority of *Hite's Heirs v. Wilson and Dunlap*(b) is relied upon. But that case goes no farther than to settle the doctrine that every thing, *out of the record*, that is, every defence which is matter *in pais*, must be *pleaded*. But here the objection did appear by the record: the intervening time was shewn on the face of the last bill and its exhibits. *Coop. Eq.* p. 304. is admitted to say expressly that this matter must be pleaded; and this on the authority of 2 *Vezey*, 109. The same author had before asserted this doctrine, (p. 216.) on the same authority; expressly laying it down that it will not do by demurrer. Yet in the

(c) *Sherrington v. Smith*.

note he refers to 1 *Bro. Parl. Cas.* 95.(c) as *contra*.

The case of *Edwards v. Carrol*, in 1760,(a) a still stronger and later case, and on higher authority than that of *Vezey*, settles the principle that the Court will notice it *ex officio*: for *there* was a general demurrer: and this upon very good reason; for the party who files a bill of review must take it out of all exceptions *appearing by the record*. The defendant needs no plea to introduce his objections: the *record* operates as a plea.

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(a) 5 Bro.  
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It is said too that the *infancy* of some of the plaintiffs shall save the rest; because the decree of dismissal, being *joint*, if void as to any, is void as to all; and *Styles*, p. 400. is quoted. But it is not proper to deduce conclusions from the *common law forms* of entry, as governing cases *in equity*. The case in *Styles*, is one of a *joint judgment at common law*: and cases are reported which shake this rule as applicable to all cases of joint judgments in which an *infant* is a party.(b) But the decree now in question is not joint but several in every thing. Was it not competent for the *adults* to proceed to review it, whether the *infants* would join, or not, as *plaintiffs*? There is nothing, therefore, in the infancy of some of the parties to take the *adults* out of the operation of time: and as to *them*, at least, the decree of 1797 cannot be set aside.

(b) 1 Salk.  
205 *Cone v.*  
*Bowles*; and  
*Curthew*, 122.  
S. C.

3. The plaintiffs have not made a case which justifies the decree of *November*, 1805. Under the act of 1785, the mother would have taken the whole estate in this case. How far does the 5th section of the act of 1792 repeal that provision? Mr. *Call* says *totally*: it destroys her heritable blood altogether; it annihilates her existence.

Be it, then, that the mother is excluded from the inheritance. Who takes next? Do the *paternal uncles and aunts*? Certainly not under the act of 1785: because, by that act, where there were neither children, father, mother, brothers or sisters, or their descendants, the paternal uncles and aunts did not come in; but the estate was divided into *two moieties*, one of which was to go to the *paternal*, the other to the *maternal* line. If, then, the act of 1785

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would not give the *whole* estate to these plaintiffs, does the 5th section itself, of the act of 1792, give it to them? No: for Mr. Call says, and says truly, *that section is not donative*, but only *excepts* a particular case out of the canon of 1785. On what then do they found their title?

It is clear that Mr. Call thought that, on his removing the *mother*, these plaintiffs would stand next under the general law. In pursuit of this idea, he advanced the position that, if the person who stands next to the *propositus* have no heritable blood, the estate passes on to the next, as if such intermediate person had no existence. This is not believed to be true: certainly *not universally*: for, at common law, where the blood of the *eldest* son was *attainted*, the *next*, though free from attainder, could not take. So, in the case of the *eldest* being an *alien*, the *next* son a *citizen*; it is a *moot* point whether the *latter* could take: our law of descents considered it so, and therefore provided for it. (a) So the statute of 1 Jac. I. c. 4. s. 6. having pretermitted popish recusants, but not prescribing who should take the inheritance, another statute was necessary. (b)

(a) 1 Rev.  
Code, p. 169.  
c. 93. s. 18.

(b) 2 Tuck.  
Bl. App. p. 33.  
note.

But, admitting the principle correct, and that the mother is to be considered dead, the 5th section merely excludes from the inheritance the *mother*, and "any issue which she may have by any person other than the father of such infant;" but leaves the *ascending and collateral relations of the mother* where they stood under the act of 1785.

What decree then is right? and where shall the rule be found? *Brown v. Turberville* (a) was on a different case; the only question there being, whether the words interpolated in the 7th section covered the case of an adult: and, except an *obiter dictum* of Judge PENDLETON, there is nothing in that case touching this.

(c) 2 Call,  
390.

Upon the whole, then, the plaintiffs have not made a case to justify the decree; which, therefore, should be reversed.

Wickham requested leave to make a few additional observations. If the plaintiffs had brought *separate suits* for the real and personal estates, the decree as to the personal would have been final. If their coupling both in *one bill* makes it otherwise, it follows that the plaintiff has it in his power to *oust* the Court of Appeals of jurisdiction, at his own discretion, by the manner of bringing the suit: a conclusion too monstrous to be tolerated.

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As to the inheritance, the case of *Dilliard v. Tomlinson*(a) <sup>(a) *Ante*, p. 183.</sup> shews that the *words* of the act, when plain, are binding, and *construction* is not admissible against them. Therefore, *here*, as the words only *exclude* the mother, and do not say to *whom* the estate is to go, the Court cannot supply a disposal of the estate. As to the *personal* property, (*the law not providing*,) the mother, as *administratrix*, is in *possession*, and the plaintiffs have no claim upon her; like the case of a husband administering on his wife's estate, who is not to be called upon for distribution.(b)

(b) 1 Rev.  
Code, p. 164.  
c. 92. s. 27.

Wednesday, October 24. The Judges pronounced their opinions.

Judge TUCKER. This is a case arising upon the construction of our law of descents, and of distribution of personal estate; where an infant of the age of thirteen years died possessed of real and personal estate derived from his father; leaving a mother, (and other relations on the mother's side, as it would seem,) but no brother, or sister, whatever, nor any descendant from them.

A preliminary question, however, arises from the following circumstances. The infant, *Edward Septoe*, died in *May*, 1794. His mother administered upon his estate, and entered into possession of the whole, both real and personal. A part of the present plaintiffs, uncles and aunts on the part of the father, or descendants from them, brought their bill against the mother for a division of the estate, *claiming the whole*. In her answer she states, that she had been ad-



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vised she had a right to her son's personal estate; and, if so, some of *her near connections* may be benefited by it: which seems to shew she had near relations who were no parties to the suit. On the 17th of *March*, 1797, Mr. *Wythe*, then Judge of the High Court of Chancery, pronounced his decree, whereby he decided that the complainants had no right to the slaves, or personal estate, and dismissed the bill as to the part thereof which claimed the same, and demanded an account of the administration thereof. But, being of opinion that the complainants were entitled to the lands, he directed partition thereof to be made among them in certain proportions, and appointed Commissioners to state an account thereof, and to settle and adjust an account of the profits, since the death of the infant *Edward Steptoe*, to be reported to the Court. But, before any farther proceedings were had, *Elizabeth Steptoe*, the mother, died, having made a will, and appointed the appellant, *Templeman*, her executor; and *William Steptoe*, another defendant, having also died, the suit abated as to both those original parties.

After the division of the High Court of Chancery into Districts, (the act for which passed in *January*, 1802,) the present complainants filed a bill (the date of filing which does not appear) in the *Williamsburg* Chancery District Court; in which they speak of the former decree as *interlocutory*, and still *amendable* by the Court, and therefore pray that they may have the benefit of all the proceedings in the original suit, except the said interlocutory decree, which, as they are advised, *ought to be set aside*, partly for *error apparent on the face of it*, and partly because the execution of certain parts of it has become impossible; and pray process of *subpœna* to *revive and answer* against the appellant *Templeman*, as executor of *Elizabeth Steptoe*. One of the suggestions in this bill, which states that *William Steptoe* died in *April*, 1803, shews that the filing of the bill was after that period, so that more than six years elapsed

between the time of pronouncing the first decree, and the preferring the present bill.

To this bill *Templeman*, the executor of the mother, after disclaiming any connection with the real estate, pleads the decree of *March*, 1797, as a *final* decree in bar of the claim to the slaves and personal estate, and account of their hires, since the death of his testatrix, or of the administration of his testatrix on the personal estate of her husband, *George Steptoe*, deceased, &c.; and insists on the length of time, and acquiescence of the plaintiffs under that decree.

The replication to that plea denies that the decree of *March*, 1797, was *final*, in any respect, but says nothing of the lapse of time or acquiescence under the decree.

In *November*, 1805, the cause was heard before the Chancellor of the *Williamsburg* District, who pronounced a decree overruling the defendant's plea, and declaring that, neither the mother, though alive at the death of her son, nor any relations on her part, were entitled to any share or proportion of the infant's estate, real or personal, and directing that the whole should be distributed among the complainants, as heirs on the part of the father, in the several proportions therein mentioned, together with an account, &c. in order to a *final* decree.

From this decree the defendant *Templeman* prayed, and obtained an appeal to this Court, by virtue of the act of 1797, c. 5. authorizing the High Court of Chancery, in its discretion, to grant appeals from interlocutory decrees. Before which period no appeal could be granted until a *final* decree.

The counsel for the appellees contend, that the original bill having been *dismissed*, as to the *personal* estate, by the decree of *March*, 1797, that decree was *final* as to that matter; and that the plaintiffs were barred by length of time from filing a bill of *review*.

If the premises be correct, I think the conclusion must be so too. For the utmost period within which an appeal from

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(a) 3 H & M.  
199—217.

a Superior Court of Chancery to this Court lies, seems to be *three* years, as was fully discussed in the cases of *Tomlinson v. Dilliard*, and *Mackey v. Bell* (a) By analogy, then, I should suppose that a bill of review would not lie after that period. For that would be granting more power to the Judge of the same Court to reverse the decrees (pronounced by his predecessor perhaps) than the law vests in this Court. Instead of resorting to the period assigned to writs of error at common law, I think it far more reasonable that the period which the law has assigned to appeals from the Courts of Chancery be adopted as that which bars a bill of review. In *England* the statutory law is silent as to appeals from the High Court of Chancery. Therefore, the analogy to writs of error at common law was adopted. But our law having assigned a period within which appeals in Chancery must be brought, that period appears to me the proper standard by which the granting of bills of review should be governed. It is unnecessary, I conceive, to consider how far the saving in favour of infants might operate: the analogy must be observed throughout; and, if any of the parties were infants, their case is provided for.

But the counsel for the appellants insist that the decree was not final, but merely interlocutory, and therefore still in the breast of the Court. The inconveniences of such a construction were most ably commented upon, and illustrated by the opposite counsel. They are such as, in my opinion, to deserve not only the attention of the Courts, but of the Legislature. That a decree of *dismissal*, which in its nature seems conclusively to determine every question of right, after being acquiesced in for *six* years, should be liable to be set aside by the successor of the Judge who pronounced it, and thereby affect, perhaps, the rights of *bona fide* purchasers for a valuable consideration, actually paid, upon the principle that they were purchasers *pendente lite*, seems so far repugnant to every idea that I have of justice, or equity, that I cannot well imagine a case that would call more loudly for legislative aid and protection, if the offended

dignity of Courts should pronounce against the claim of such *bona fide* purchaser. But that case is not before us, and I hope never will be, though not unlikely to happen very frequently, if the practice be permitted to prevail; which it certainly ought not, so as to affect *others*, now that the law allows appeals from interlocutory decrees. In the present case, however, as the law stood at the time the decree was pronounced, no appeal lay; for, however cogent the arguments to the contrary appear in my eyes, I am constrained by former *precedents* to say that the decree of *March*, 1797, was not a *final* decree between the parties, all of whom were still retained in court, although the bill, as to a part of the subject claimed, was dismissed. (a) The succeeding bill is, therefore, to be taken as a bill of *revivor* and *supplement*, by which the cause was brought regularly before the Judge who pronounced the second decree.

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(a) *Grymes v. Pendleton*, 1 *Call*, 54.

By that decree, as I have already noticed, the Chancellor decided that, neither the mother of the infant, nor any relations of the infant, on the part of the mother, were entitled to any portion of his estate, real or personal.

That decision, so far as it respects the mother herself, or any of her descendants, other than children by the father of the infant, or their descendants, appears to me to be perfectly correct. But I differ with the Chancellor so far as respects the father or mother of the mother, or any of her collateral relations, all of whom, in the events which have happened, appear to me (if in being at the time of the infant's death) to be entitled to a portion of his estate, real and personal.

The following principles appear to me not to require any argument, or authority, in support of them.

1. That the laws of descent, or rules of succession *ab intestato*, to property real or personal are merely creatures *juris positivi*.

2. That, by the act of 1785, c. 60. all former rules and canons of inheritance and succession to estates real and personal within this Commonwealth, whether established by

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the common law or by statute, were entirely rescinded, abrogated and annulled: and that they cannot be revived in any manner, but by some express legislative provision for that purpose.(a)

(a) See *Acts*  
of 1789, c. 9.

3. That, if, by any subsequent act, any case provided for by the act of 1785 shall now happen *not* to be provided for, the *Legislature only* is competent to provide for such omitted case.(b)

(b) See 1 T.  
R. p. 52.

4. That the case of an infant having lands by descent or purchase from his father, already deceased, dying in the life-time of the mother, and leaving no child, nor brother, nor sister, nor any descendant from either of them, was fully provided for by the fourth section of the act of 1785, c. 60.

5. That the same happens now *not* to be provided for, by the operation of the act of 1792, c. 93. s. 5. The law declaring only that, in such case, the *mother* shall *not* succeed to the same: without designating any *other* person or persons to whom the succession shall belong *during the life of the MOTHER*: neither the seventh section of that act, nor any subsequent part thereof, providing for the succession in any such case.

From these principles, as premises, it appears to me that, in the case above supposed, (which is the same with that before the Court,) the succession to the inheritance *during the life of the MOTHER* was in *ABEYANCE*; and that, at *her death*, the whole estate, real and personal, ought to go to the same persons, and in the same proportions, as the same would have descended, if there had been *no mother*, nor brother, nor sister of the infant, nor any descendant from either of them, at the time of the death of the infant. And, consequently, that, *after the death of the mother*, the estate, both real and personal, ought first to be divided into two moieties, *one* of which *moieties* ought to be allotted to the plaintiffs in the several proportions, by which the Chancellor in his decree has directed that the *whole* shall be allotted; and that the *other moiety* be reserved for the benefit

of those relations on the part of the mother (of which by her answer to the original bill it appears probable there were some living at the time of the infant's death) who may within a reasonable time assert and prove their claims thereto. But if no such relations on the part of the mother shall assert their claim within a reasonable time; to be limited by the Court of Chancery, that the *other moiety* be then divided among the plaintiffs in the same proportions as the former.

It also appears to me, that, as no person was capable of succeeding to the inheritance as *HEIR, during the life of the mother*, the account of rents and profits, subsequent to the death of the infant, ought not to be decreed to be taken for that period which elapsed between the death of the infant and the death of his mother. The inheritance, *during that period*, being, as I have already said, *in abeyance*, the *first occupant*, who might enter and possess himself thereof during that period, might, as I conceive, lawfully hold the same, and take the rents, issues, and profits thereof to his *own* use, so long as the mother lived, without being in any manner chargeable or accountable for the same to the persons to whom the succession may belong, *after the mother's death.*(a)

My opinion, therefore, is, that so much of the Chancellor's decree as is in opposition to these principles be reversed, and that a decree conformable thereto be now made: and that the remainder of the decree be affirmed.

To prevent any misconception of this opinion, I beg leave to add that, if there had been any brother or sister of the infant on the part of his father living at the time of his death, or any descendant from them, such brother, sister, or their descendants, would have been entitled to take the estate *immediately*, notwithstanding the mother was then also living; as, in such a case, the inheritance would not have been in *abeyance* for a moment.

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(a) See *Tucker's Blackstone*, vol. 2. App. p. 28—42. for the reasons at large upon which this opinion is founded.

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Judge ROANE. With respect to the first question made in this case, I consider it as the established doctrine of the Court that a decree of the inferior Court is not to be considered as final, until the cause is completely dismissed therefrom. Until that is the case, the Court below has, itself, the power to correct any errors it may have committed, and any decree it may have rendered is, therefore, not to be considered as *final*. Most of the arguments now used on this topic have been used and overruled on former occasions.

As to the question now made upon the act of descents, I believe it will be admitted that I have borne my testimony\* against the policy which gave rise to the act of 1790, restoring, in a measure, the feudal principle of the blood of the first purchaser. But, while I shall never be in favour of extending that principle in doubtful cases, by construction, I do not deny the power of the Legislature to make the innovation. The question before us is then purely a question of construction upon the intention of the Legislature as manifested in the act itself.

No man can be more sensible than I am, of the impropriety of extending the construction of an act by mere implication; especially to further an odious or unjust principle; but I apprehend that an implication may be so *strong* and *necessary* as to be equivalent to an express declaration by the Legislature. This I take to be the case in the present instance. The exclusion of the *mother* in the event that there is a brother or sister on the part of the father, or a brother or sister of the father, is substantially equivalent to an express declaration that the persons last mentioned shall themselves succeed; and this the rather, as the first section of the act of descents purports to provide a rule of inheritance as to all cases, and which idea is entirely supported by the opinion of this Court in the case of *Brown v. Turberville*. I consider that decision as a complete au-

\* In the two decisions in the case of *Tomlinson v. Dilliard, &c.*

thority to overrule the idea that the inheritance is in *abeyance* in the case before us. The succession in this case, therefore, does not rest upon a mere naked implication, but upon an implication so strong and necessary, (all the circumstances considered,) as to be equivalent to an express declaration by the Legislature. In this last respect this case differs from the one put in a note to 2 *Tuck. Bl. App.* p. 33. where an elder child being disabled from inheriting by receiving a popish education, and the statute which disabled him (1 *Jac. I.*) *containing no declaration* who should have the land, a subsequent statute was deemed necessary to be made in favour of the next of kin.

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It is a sound rule of construction that, if it can be prevented, no clause, sentence, or word, shall be rendered superfluous, void, or insignificant. (a) In the case before us it is difficult to say wherefore the brothers and sisters on the part of the father, and *à converso*, were mentioned in the act, but for the purpose of following up the principle on which the change of the rule was founded, and giving the estate to them, instead of the excluded parent.

(a) 6 *Bac.* 380.

Upon the whole, my construction of the act of 1792 is, that it is entirely similar to that of 1785, with the single exception of the amendment made by the act of 1790; (which is kept up and extended by the 5th and 6th sections of the act of 1792;) and that those sections operate by way of exception from the general law in the cases put therein, as well by substituting one heir, as excluding another. The error on this point seems to be in considering the canons of the act of 1785 as *still in force*, (for example, in favour of the paternal grandfather and maternal grandmother,) while at the same time the succession is changed, in a particular case, in favour of the maternal uncles and aunts, &c. As to the justice of this alteration, the power of the Legislature being admitted, we are compelled to say "*stet pro ratione voluntas.*"

I therefore concur with the Chancellor in his construction



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in the present instance, which is also that of the public at large, and thereby avoid the great evil (as almost all *infants* derive their property either on the part of the father or the mother) which would result from deciding that, in cases like the present, no rule of descent is provided by law, and that the estates are, consequently, in every instance, to be considered as in *abeyance*.

Judge FLEMING. The counsel for the appellant, in their statement, rested the cause on two points only:

1st. That the original decree was right; and,

2d. That the bill having been dismissed as to the personal estate, the decree was final as to that matter; and the plaintiffs were barred by length of time from filing a bill of review.

The cause was argued with great ability on both sides, but much the greater part of the arguments of the appellant's counsel seemed predicated on the assumption of facts which, in my apprehension, did not exist; to wit, that the decree of *March, 1797*, was final; and that the bill against *Templeman*, as executor of *Elizabeth Stephens*, was a bill of review. In order to prove that the decree of 1797 was final, it was strenuously argued that there ought to have been two separate and distinct suits; one for the real, and the other for the personal estate: but, for what *good* purpose there should have been more than one suit, I am at a loss to discover. The counsel proceeded to argue that, as the Chancellor decided the *right*, respecting the personal estate and dismissed the bill, *as to that subject*, the decree was *final*: but this Court has never considered a decree to be final, so long as the parties remained in Court; but every order and decree made during that space, has been considered as interlocutory, and subject to revision; as in the cases of

(a) 2 Wash.

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(b) 1 Call, 54.

(c) *Ibid.*, 55.

*Young v. Skipwith*, (a) *Grymes v. Pendleton*, (b) and *M'Call v. Peachy*. (c) In the former case, *Skipwith* brought his bill against *Young* for the moiety of a tract of land, according to contract. The Chancellor decreed for the plaintiff a moiety

of the land, (which completely decided the rights of the parties,) and appointed a Commissioner to make a partition accordingly. *Young* appealed to this Court, which, after a long and solemn argument on the merits of the cause, decided unanimously that the decree was interlocutory, dismissed the appeal, and remanded the cause to the High Court of Chancery; as was likewise done in the cases of *Grymes v. Pendleton*, and *M'Call v. Peuchy*, noticed above: and in several subsequent cases, after the act of *January*, 1798, allowing appeals (by the Court of Chancery) from interlocutory decrees; particularly, in the cases of the *President and Professors of William and Mary College v. Lee's Executors*, and of *Fairfax v. Muse's Executors*.<sup>(a)</sup> In the latter case, there was a decree to foreclose the equity of redemption of mortgaged lands, and the premises ordered to be sold: yet this Court unanimously dismissed the appeal, as having been improvidently allowed, in *vacation*, from an *interlocutory* decree; which was not authorized by law. And, had an appeal been allowed, in the case before us, from the decree of *March*, 1797, there is not a doubt on my mind but it would have been dismissed, as having been prematurely granted. Considering *that* decree then as interlocutory, and not final, the argument, that a bill of *review* was barred by length of time, falls to the ground. But, in my apprehension, it is not a bill of *review*, but a bill of *revivor* and supplemental bill, which the several deaths of *Elizabeth* and *William Steptoe*, who were the executrix and executor of *George Steptoe*, deceased, made necessary, in order to bring the whole subject in controversy properly before the Court; and in which the widow, and the children of *William Steptoe*, (eight in number,) were made parties, plaintiffs; and who, by the last decree, are made distributees of one fourth part of the estate of the said *Edward Steptoe*, deceased, the widow's dower therein being first allotted to her; all which appears to me to have been correct and proper.

As to the length of time that the appellees acquiesced in, and left undisturbed, the decree of *March*, 1797, it may be

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(a) 2 H. & M.  
557. and note  
(2), 558.

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well accounted for. The Commissioners appointed, by that decree, to state an account of the real estates whereof the said *Edward Steptoe* died seised, and to settle and adjust the profits of the said estate, since his death, had made no report of their proceedings, before the deaths of the said *Elizabeth* and *William Steptoe*, when the bill of revivor, and supplemental bill, became necessary for the purposes aforesaid. I come now to consider the cause on its merits, and to decide, according to the best of my judgment, the rights of the parties to the estate of *Edward Steptoe*, deceased, under our several acts of Assembly. And here a difficulty seems to arise, and a difference of opinion among the Judges, respecting the exposition of those acts; which circumstance, and the very ingenious arguments of the counsel, induced me to consider the subject with more than ordinary attention; and, after the most mature deliberation, the difficulty to me appears easily solved, by giving to those acts such a construction as I conceive to have been the sense and intention of the Legislature, at the several periods when they were passed; and, as I believe, agreeably to the *general* sense and understanding of the community at large.

It was objected by the appellees' counsel, though not much relied on, that the fifth clause of the act of 1792, under which the appellees claim, is only a *proviso*, or an exception, to the general principles, words, and meaning of the preceding clauses; and ought not to have the same force and effect as if it had been declaratory, and an enacting clause.

Our first act of Assembly, altering the course of descents from that of the common law, was passed in the year 1785; in which the sense of the Legislature was expressed in general terms; as it was likewise in the 24th section of the act of distribution, passed the same session, and referring to the act of descents, for the distribution of goods and chattels: but, in the year 1790, an important change was made, in cases of *infants* dying without issue; and, by an act passed the 24th of *December*, in that year, entitled "An act to amend the act entitled an act directing the course of descents," it is

enacted (section 3.) that, "where an *infant* shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the *father*, the *mother* of such infant shall not succeed to, or enjoy the same, or any part thereof, by virtue of the said recited act, *if there be living any brother or sister of such infant*, OR ANY BROTHER OR SISTER OF THE FATHER, OR ANY LINEAL DESCENDANT OF EITHER OF THEM:" in which act there is another clause, *vice versa*, excluding the *father*, &c. where the estate is derived from the *mother*. In the same act there is a repealing clause in the emphatic words following: "So much of all acts as comes within the purview of this act, and PARTICULARLY of the act entitled an act directing the course of descents," (viz. the act of 1785,) "shall be, and the same is hereby repealed." The above clauses, respecting cases of infants dying without issue, are declaratory and explicit, and not *exceptions* to clauses of general import. It is true that, when they are incorporated into the act of 1792, "to reduce into one the several acts directing the course of descents," they are there inserted as provisoes to the *general* course of descents in the preceding clauses; *with the exclusion of any issue which the mother may have by any person, other than the father of such infant*; which latter exclusion was not in the act of 1790: and so in the clause excluding the father, &c. from inheriting any estate derived from the mother.

But it is contended, in the present case, that the 5th clause of the act of 1792, which excludes the mother from the inheritance, is in negative words, and no express declaration who shall inherit the estate; and therefore it is a *casus omissus*; and, during the life of the mother, the estate was *in abeyance*, there being no person in existence capable of inheriting; as the infant died, leaving neither brother nor sister; and that, on the death of the mother, (there being no provision for the case in the act of 1792.) so much of the act of 1785 as directs that the inheritance shall be divided into moieties, one of which shall go to the paternal, and the other to the maternal kindred, is revived, and in force; (the course of descents by the common law being

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done away by the statutes; and it being a rule, that a statute cannot be repealed by implication.) But we have already seen that the act of 1785, so far as it was within the purview of the act of 1790, which completely embraced, and, in my conception, provided for, the case before us, was repealed in as express terms as language could devise.

And, further, in the act of 1792, directing the course of descents, there is a clause declaring that all and every act and acts, clause and clauses of acts heretofore made, containing any thing within the purview of this act, shall be, and the same are hereby repealed. The act, then, of 1785, or so much thereof as was within the purview of either the act of 1790, or the act of 1792, was clearly repealed. And it is a rule of equal force with the one mentioned above, that a statute *once repealed* shall not be *revived* by implication. There is also another important rule of construction that well applies to the case before us; which is, that *force* and *efficacy* is to be given to every sentence, and *significant word*, in a statute, which does not contradict or obscure some other part of the same statute; and that, where words or expressions are ambiguous, and of doubtful meaning or effect, such interpretation and application shall be given them, as to fulfil the object and intention of the Legislature, if the will of the Legislature can be fairly deduced from such words or expressions. And here let me premise that, in my conception, the Legislature intended to provide, and hath provided, for every possible case that could happen, (and such was the sense of *all* the Judges in giving their opinions in the case of *Brown v. Turberville*,) and, particularly, is there provision made for the one now under consideration; and others of a similar nature; and that, as *Edward Steptoe* died under age, and without issue, having an estate of inheritance derived by purchase from his *father*, neither his *mother*, nor *any issue* which she might have had by any person, *other than his father*, could succeed to, or inherit, any part thereof: and, as there was no brother nor sister of the said *Edward Steptoe*, nor descendants of such, living at the time of his death, the bro-

thers and sisters of his father *George Steptoe*, deceased, and their descendants, (the present appellees,) have a right to the inheritance; which I conceive to have been clearly the will and intention of the Legislature; or why was the mother, and any issue which she might have by any person other than the father, excluded from the inheritance, "*so long as there should be living any brother, or sister of the father, or any lineal descendant of either of them?*" To give the latter words any other construction would, to my mind, render them nugatory, and so many dead letters: and they are certainly of too important signification to be thus considered. And I construe them on the principle that a devise of lands to a son, *after the death of his mother*, gives to the mother an estate for life by implication.

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I am therefore of opinion, that the decree is correct, and ought to be affirmed; and (the decree being interlocutory) the cause remanded to the Superior Court of Chancery of the District of *Williamsburg*, for farther proceedings to be had therein.

By the majority of the Court, decree AFFIRMED, and cause remanded for farther proceedings.

Paynes against Coles and others.

Thursday,  
October 11.

JOHN PAYNE and *Mary Payne*, infants, by *Mary Payne*, their mother and next friend, filed their bill in the

1. A record of one suit cannot be read as evidence in another.

another, unless both the parties, or those under whom they claim, were parties to both suits; it being a rule that a document cannot be used against a party who could not avail himself of it, in case it made in his favour.

2. An answer in Chancery (though, in form, responsive to a question put in the bill) is not evidence, where it asserts a right, affirmatively, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill.

3. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer, without proof. Neither is this rule to be varied by the circumstance that infants are interested.

4. The aid of a Court of Equity ought not to be afforded to set up a marriage promise when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

5. *Quere*, whether a Court of Equity ought, under any circumstances, to assist, to the prejudice of a posthumous child, the claim of devisees under a will (made before the 1st of January, 1787) by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy?

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late High Court of Chancery, on the 1st of *March*, 1796, against *Walter Coles*, *Isaac Winston*, and *Lucy* his wife, *Garland Anderson*, and *Mary* his wife, *Thomas Price*, executor of *William Darracott*, deceased, and *John Syme*, and *Sarah* his wife; setting forth that *Williams Coles*, late of *Coleshill*, in the County of *Hanover*, (being the father of three children, to wit, a son named *Walter*, and two daughters, *Mary*, the mother of the plaintiffs, and *Lucy*, the wife of *Isaac Winston*,) on the 4th of *September*, 1768, wrote a letter to *Mrs. Darracott*, the mother of *Mary Darracott*, to whom his son was then paying his addresses, informing her that the match would be very pleasing to his wife and himself; that he intended to give his son, immediately, to the value of 3,000*l.* current money, in land, slaves, and other things; and, at his own and his wife's death, he would leave him the land he then lived on, "with his possession in *Ireland*, and some more slaves," &c.

The bill farther stated that (whether before or after the said letter was written, the plaintiffs knew not) the said *Williams Coles* told *William Darracott*, brother of *Mary Darracott*, that "if the match should take place, he would give his son at the time of the marriage his plantation in *Goochland County*, and sixteen or eighteen negroes, seventy or eighty head of cattle, and other stock upon the said plantation, and that at his death he would give his said son the plantation whereon he then lived, and other negroes, and some other estate; that the marriage took effect, but the agreement was not executed; that, some time in the year 1769, *Walter Coles*, the son, departed this life, having made a will, in which, after bequeathing to his wife *Mary* all the slaves, horses, and all other things that he had with her as a marriage portion, and ten pounds current money, and to each of his sisters a mourning ring, he "gave and bequeathed to his *father and mother* all and singular the remaining part of his estate of any nature or kind soever, to them and their heirs for ever;" that the *defendant Walter* was his *posthumous* son; he having had no child living at

the date of the said will; which, as the plaintiffs were advised, passed his rights under the marriage agreement from his infant child to his father and mother. They were farther advised, that the father and mother took under the will as *joint-tenants*; that *Williams Coles*, the father, dying about the year 1781, intestate, his moiety survived to *Lucy Coles*, the mother; and that, upon her death in the year 1784, the whole right to the benefit of the said marriage agreement devolved (by virtue of the residuary clause in her last will) on the plaintiffs. The bill moreover set forth that *William Darracott* administered on the estate of *Williams Coles*, and *Walter Payne* qualified as executor of *Lucy Coles*; but that *Darracott*, as administrator of her husband, had previously taken possession of her whole estate, (alleging that her lands had descended on the defendant *Walter Coles*, his nephew, as heir at law of the said *Williams Coles*, and that the slaves and personal property belonged to the estate of his intestate,) and made such distribution of the estate as to him seemed meet; leaving the defendant *Walter Coles* in possession of the land, and far greater part of the other estate; and allowing no part of it to the plaintiffs; thereby preventing *Walter Payne*, the executor, from performing the duties of his office; that the said *Walter Payne*, having gone beyond sea, had not been heard of for seven years; and thus, the plaintiffs had been deprived of all benefit from the devise aforesaid in their grandmother's testament; notwithstanding she therein appointed *Sarah Syme*, wife of Col. *John Syme*, trustee and manager for them; the said *Sarah* having never interfered, under the trust, to have justice done them; that the defendant *Walter Coles* had held the estate, allotted him, ever since the distribution; that *William Darracott* is dead, and *Thomas Price*, his executor, is the only person who can account for his acts in relation to these estates.

The prayer of the bill was for an account of so much of each of the estates of *Williams* and *Lucy Coles*, as was received by the defendants, *Walter Coles*, *Isaac Winston*,

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and *Lucy* his wife, and *Garland Anderson*, and *Mary* his wife; for an account of the administration by *William Darracott*, to be rendered by the defendant *Thomas Price*, his executor; "that the said *Walter Coles* be decreed to convey to the plaintiffs all lands, whether in this country or in *Ireland*, to which they are equitably entitled under the above devise of the testament of their grandmother, and which (independently of the above recited letter and conversations, the testament of his father, and the testament of his grandmother) would have descended to him by right of inheritance, or any other title; and that the defendant, *Sarah Syme*, be compelled either to accept of or relinquish her trust aforesaid, and, in the former case, to execute the same agreeably to the principles of equity in like cases."

The defendant *Walter Coles* answered, saying that "it may be true that *Williams Coles* his grandfather did, on the 4th of *September*, 1768, write such letter as is set forth in the bill, but for greater certainty refers to such proof as the complainants can bring concerning the same: he has understood that the said letter was written at the instance of *Mrs. Darracott*, grandmother of this defendant; and that the said *Williams* was induced to write it by information received of her, or from some other relation of his mother, that her fortune was much more considerable than it was afterwards found to be. He admits that the marriage took effect, but denies that the said *Walter Coles*, this defendant's father, became possessed of the property mentioned in the said letter. He further saith, that his said father, when he made his last will, had no knowledge of the pregnancy of his wife: and this defendant submits it to this honourable Court whether, as the said will was made when his father had no child, the subsequent birth of this defendant did not operate as a revocation thereof; but, if it shall be thought otherwise, he insists that, as his said father was not possessed of the estates mentioned in the said letter, the same did not pass by his will; more especially, as it evidently appears, from the will itself, and the then situation of the

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parties, that the said estates were not in the contemplation of the testator when the will was made. This defendant does not admit the *parol* agreement between his grandfather and his uncle, stated in the bill; and supposes that, if any such conversation took place, it ought to be considered as having no effect, so far as the same is different from the letter referred to by the complainants."

The same answer farther states that "*Williams Coles*, the grandfather, proved the will of the said *Walter*, whereof he was appointed executor, but never held any of the *property*, mentioned in his letter, under the devise from his son, but as his own several property; in like manner as if the said will had never been made; that *Lucy Coles* never held any part of it, except as widow of the intestate; and, if she made such will, (which, however, the defendant contested, having instituted a suit in Chancery to set it aside,) she never meant that *this* property should pass by it; that *Dar-racott*, the administrator, made distribution of the property of his intestate (as he had a right to do) between *Mary Payne*, the mother of the plaintiffs, *Isaac Winston* and *Lucy* his wife, and this defendant; they being the persons entitled thereto; that this defendant never has had possession of any property which he conceives to have belonged to his grandmother, *Mrs. Coles*, and only received his share as heir and distributee of his grandfather; that the plaintiffs cannot set up any *legal* claim under the marriage contract alleged by them to have been made by this defendant's grandfather, and he submits it to the Court, whether the same ought to be carried into effect, *in equity*, to the prejudice of the issue of the marriage, for whose benefit it must have been intended; insisting that, if the same ought to be performed, he, being the sole issue of the marriage, ought to receive the benefit thereof. He further saith, that, as no claim was ever set up under the said letter, either by his grandfather or his widow; and, as the complainants claim under the letter; he conceives himself entitled to, and prays the benefit of the act of limitations."

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*Garland Anderson* and *Mary* his wife answered separately; the former alleging total ignorance as to *Mrs. Coles*, or any of her affairs; the latter stating that she did not remember ever to have seen *Mrs. Coles's* will; had heard that a legacy was left her; but had never received it.

Only one deposition was taken in the cause; and that went to prove the execution of *Mrs. Coles's* will.

The exhibits were the wills of *Walter Coles* and *Lucy Coles*.

The plaintiffs also exhibited the proceedings in the suit in *Hanover County Court*, on behalf of the defendant *Walter*, (when an *infant* about two years old,) against *Williams Coles*, his grandfather; claiming the benefit of the marriage agreement. The bill in that suit relied upon the letter above mentioned as the foundation of the plaintiffs' claim; and the answer admitted the said letter to have been *written*; but contended that it ought not to be *binding*; having been produced by a deception as to the amount of *Mary Darra-cott's* fortune; and being unreasonable in itself; and that the will of *Walter Coles* operated as a *release* from the said agreement.

Sundry depositions were taken, but no decision appears to have taken place.

To the admission of the bill, and proceedings thereon *in that suit*, as evidence in *this*, the defendant *Walter Coles*, by his counsel, filed a written exception.

The suit was dismissed, by order of the plaintiffs' counsel, as to the defendants *Isaac Winston* and *Lucy* his wife; and, on the 4th of *October*, 1803, the cause coming on to be heard as to the other defendants, the Court dismissed the bill with costs; from which decree the plaintiffs appealed.

The record also contains a copy of the proceedings in a suit brought in *Hanover County Court* by the defendant, *Walter Coles*, against the present plaintiffs and others, for the purpose of setting aside the will of his grandmother *Lucy Coles*; which suit was removed by a writ of *certiorari* to the High Court of Chancery, and decided on the same

4th of October, 1803, by a decree dismissing the bill with costs; from which decree no appeal was taken.

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In that suit, *Mary Payne*, one of the defendants, and daughter of *Lucy Coles*, alleged in her answer, (among other things,) that the said *Lucy* was twice married; first to *Cornelius Dabney*, and afterwards to *Williams Coles*; that, by *Cornelius Dabney*, she had issue a son, *William Dabney*, who had issue several sons, of whom *Isaac Dabney* was the eldest, and he, dying in the life-time of the said *Lucy*, and after the death of his father, left issue several children, of whom *William Dabney* was his eldest son; and that the said last-mentioned *William Dabney* (who is still alive) was, at the time of the death of the said *Lucy*, and now is, her heir at law; and, "as the estate came by the said *Lucy* altogether, or as to the greater part thereof, as her inheritance, this defendant is advised that, if the said *Lucy* had died intestate, and if the said estate had been left to pass by the rules of inheritance at the time of her death, the complainant never could have claimed it as her heir, so long as any of her descendants of the name of *Dabney* were in existence."

A number of depositions were taken in that suit; proving, on the one hand, that *Lucy Coles's* will was duly executed, and, on the other, that she had no idea that the property now claimed belonged to her, but considered it as belonging to *Walter Coles*, her grandson. No evidence appeared, either to support or contradict the allegation, that "the estate came by the said *Lucy* altogether, or, as to the greater part thereof, as her inheritance."

*Warden, Nicholas* and *Wirt*, for the appellants.

*Wickham*, for the appellees.

On the part of the appellants, the subjects in controversy were considered in two points of view:

1. As to the real estate, which *Lucy Coles* held in her own right; and,
2. As to the estate comprised in the marriage promise.

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1. It must be clear that, if *Lucy Coles* held any real estate in her own right, it belongs to her devisees under her will. In the bill exhibited by the appellee *Walter Coles* to set aside that will, he called upon the defendants, *Mary Payne* and others, to say, whether the said *Lucy Coles* in her life-time did not at all times declare that she considered the title to the land and other property which he held, derived from his grandfather, to be completely vested in him, independent of her, and that she could not dispose of the same by will or otherwise. To this question *Mary Payne* answered that *Lucy Coles* had said, (and this defendant moreover asserted that the fact was so,) that the greater part of the *Virginia* estate in question did not belong to him as heir of his grandfather, but was her own inheritance. In this particular the answer was responsive to the bill, and therefore evidence: at any rate, if not direct or conclusive, it was sufficient evidence to have produced a reference to a Commissioner, or a Jury, to ascertain the fact, for the benefit of the infants who were co-defendants. The decree was, therefore, erroneous in not directing such reference.

2. As to the estate comprised in the marriage promise of *Williams Coles* to *Walter*, the appellants say that this promise gave to *Walter Coles* an interest which he had a right to dispose of either by will or contract; that he did dispose of it by his will to his father and mother jointly; that *Lucy Coles* took it by survivorship, and devised it to them. They do not claim, as being originally the objects of the marriage promise, nor by virtue of consanguinity, but as purchasers under him for whom the promise was made, and who exercised his lawful right in devising it.

On the other side, it was contended, 1. That, since the appellants had no right to sue at law for the property in question, a bill will not lie in their behalf, for the specific execution of the supposed marriage agreement; their claim being highly inequitable: for a Court of Equity has a discretionary power of withholding relief, and will not compel specific performance in a *hard case*.

2. There is no sufficient proof of the agreement charged in the bill; for the record from *Hanover* is not evidence in this suit. It is true that the *appellee* claims under *Williams Coles*, the defendant in that suit, and was himself the plaintiff; but the *appellants* were not parties; neither was *Lucy Coles* (under whom they claim) a party; and the rule must be reciprocal. The record could not be used as evidence against her; and, therefore, cannot be for her. Besides, a bill in Chancery, when not sworn to, is merely suggestion of counsel, and not evidence against the plaintiff. (a) But, if it were evidence against an *adult*, it cannot be against an *infant*; for even the *answer* of an infant by his *guardian*, is not evidence against him. And, as to the *answer* of *Williams Coles*; he says he was deceived and imposed upon in writing that letter; and his statement must be taken altogether. (b)

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(a) *Doe, lessee of Bowerman, v. Sybourn, 7 T. Rep. 2, 3. Peake's Ev. 54.*

(b) *Peake's Ev. 55.*

3. Admitting the agreement to be proved; the *real estate* agreed to be settled did not pass by the will of *Walter Coles*, as he had *neither an equitable nor legal seisin*; and the *personal estate* being devised jointly to his father and mother, and being in their possession, the whole vested in the father, in his own right, and as *husband*, and no part survived to his wife.

4. The birth of the *appellee Walter Coles* operated as a revocation of his father's will, in *reason*, though not by *authority*. A subsequent marriage and birth of a child are a revocation: but no good reason can be assigned why, at common law,\* the birth of a posthumous child, for whom no provision is made in the will, should not be considered a revocation, as to such child; especially since, according to the case of *Brady v. Cubitt*, (c) an implied revocation may be rebutted by parol evidence of the actual intention of the testator. No authority can be shewn against the right of the posthumous child in such a case. In *Yerby v. Yerby*, (d) it was decided that, where a man *had* children at the time of

(c) *Doug. 39, 40.*

(d) 3 *Call,*  
334.

\* *Note.* By our act of 1785, c. 61. (see 1 *Rev. Code*, p. 160, 161.) such is now the law, as to every last will and testament made when the testator had no child living.

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the will, the subsequent birth of a child was no revocation; but that case was not like this.

5. Supposing a right to have survived to the wife; the property did not pass, and was *not intended* to pass by *her* will.

6. Possession having been delivered to the appellee in her life-time, and retained by him, the appellants are bound by length of time.

7. The appellants as residuary *legatees* of Mrs. *Coles* are not entitled to sue on the death of her executor, but the suit can only be maintained by an *administrator de bonis non* of her estate.

8. If their suit be maintainable, all the legatees of Mrs. *Coles* should have been parties.

9. The suit has not been properly followed up against *Price*, the administrator of *Darracott*, and other defendants.

*In reply*, to the first of these points, it was said, there was no injustice, or hardship, in the claim of the appellants. The marriage promise was made for the benefit of *Walter Coles*, between whom and Miss *Darracott* the match was about to take place; not for the benefit of the *issue*; about whom nothing was said. Suppose it had been complied with, and a settlement made: *Walter Coles* might surely have sold or devised the property. In like manner, his devise of his *interest* in the promise was equally good in *equity*. The enforcement of marriage articles is uniform in Courts of Equity; the construction there being the same as at law; and this is always done according to the terms *expressed* in the articles. The cases of settlements are very numerous; and it will be found that the *issue* is always expressly provided for, where it is intended; and this is done by a covenant that the estate shall be conveyed to the husband and wife for their joint lives, and afterwards to *trustees* for the benefit of the children of the marriage; to prevent the remainder in their favour from being defeated by *alienation*. (a)

(a) 2 Bl. Com.  
171.

But, if this be not done, no case can be found of a refusal

to decree execution of a marriage agreement, on the ground that the *issue* was not provided for, and would, therefore, lose the estate. In *Chichester v. Vass*, the suit was brought by *Vass*, in his own name, and he recovered; though that case was not so strong as the present, in favour of the exclusive right of the husband. There are cases, too, which shew that Courts of Equity are not so active on behalf of the rights of *issue*, as it is supposed, even where designated in the settlement. (a) Courts do not enter into ideas of abstract justice in enforcing agreements, where parties are explicit. The circumstance, then, that the *issue* was not provided for, is no bar to our suit.

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(a) *Cann v. Cann*, 1 Vern. 480  
*Clarke v. Sampson*, 1 Vezey, 100  
2 Com. Dig. 125.

It is not true, in all cases, that, where an action cannot be brought at law on an agreement, there a suit will not lie in equity for a specific performance. (b) On the contrary, if the contract be good at law, in its origin, and a Court of Law, either from the situation of the parties, or from other causes, can give none or inadequate relief, the discretion of the Court of Equity is at an end, and it must give a decree. But, indeed, the question about specific execution does not occur in this case; the only question being whether *Walter Coles* had a right to devise his own property.

(b) *Cannel v. Buckle*, 2 P. Wms. 244.

2. As to proof of the letter: it is faintly denied, or rather admitted, by the answer of the defendant *Walter Coles*. But if that be not sufficient, it appears from the bill filed in *Hanover* Court by his guardian, that the original letter was in his hands. The appellees, then, cannot be expected to produce it. The reason of the rule, which regards a bill as merely suggestion of counsel, cannot apply in this case. Neither ought the rule that *depositions* taken in a suit between different parties are not to be read to prevent our availing ourselves of the *depositions* by which the letter is clearly established. The reason of that rule proves it inapplicable. It is because the party against whom such *depositions* are offered has had no opportunity to cross-examine: but here the case was otherwise.



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(a) *Jones v. Roc, Lessee of Perry*, 3 T. Rep. 88.

(b) *Perry v. Phelps*, 1 Vezey, jun. 254.

(c) 2 Bl. Com. 181.

3. Possession was not necessary to give validity to the devise in the will of *Walter Coles*; for a possibility, if coupled with an interest, is devisable; (a) and so also is any equitable interest. (b) If the devise had been to *Williams Coles* alone, it might, perhaps, have operated as a release of his engagement: but, as it is to him and his wife jointly, thereby instituting the right of survivorship between them, (c) it must be considered as conferring a higher title. If it do not convey this equitable estate, there is nothing for it to operate upon: for it does not appear that he had any thing else to devise by the residuary clause in question. And the circumstance of his ignorance of his wife's pregnancy, though not sufficient to vacate his will, is sufficient to indicate his intention to give all his rights to his father and mother.

But it is objected that, with respect to the *chattels* bequeathed, they vested absolutely in *Williams Coles*, and did not survive. To this it may be answered, that *Walter Coles's* claim was not a legal but an equitable one. *Williams Coles* never complied with, or executed, his agreement. The case, therefore, does not stand precisely on the footing of chattels given to husband and wife absolutely. He did no act to sever the jointure; and unless some act of that kind had been done, it subsisted. In 2 Vern. 683. (d) a case is found where the right of survivorship to the wife took place as to money vested, in mortgages and bonds, in the life of the husband. But if this point be against us, it does not preclude our having an account and decree for the real estate.

(d) *Christ's Hospital v. Budgin et ux.*

4. The fourth point is clearly against the appellees: for although marriage and birth of a child, concurring, revoke a will, (e) either of those events singly does not. (f)

(e) *Wilcox v. Rootes*, 1 Wash. 140.

(f) 7 Bac. 365. (Gwill. edit.) *Shepherd v. Shepherd*, Doug. 36.

5. It is said that *Lucy Coles* never considered herself as holding under *Walter Coles's* will. But it is immaterial what are the impressions of parties of their legal rights: else what would become of the appellee himself, who brought a suit as claiming under the letter which in this suit he disclaims?

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6. The 6th objection is founded in an error in fact; for, according to the bill, answer, and evidence, possession was not delivered to the appellee by *William Darracott*, the administrator, until after the death of *Lucy Coles*. In fact, she was in possession of all the estate at the time of her death; in what character it is not for the appellee to say.

7. *Walter Payne*, the executor, having left the Commonwealth; there being *no administrator de bonis non*; all the estate of the testatrix being in the possession of the defendant *Walter Coles*; and the plaintiffs, her legatees, being the only persons entitled to the property in question; they were authorized to sue as legatees.

8. All the necessary parties have been made; for the other legatees claim no title to the property now in question.

9. If the suit has not been properly followed up against *Price*, the administrator of *Darracott*, that is no reason for refusing us a decree against *Walter Coles*. We go against him for the *land* at any rate; and further proceedings may be directed against *Price*.

*Monday, November 5.* The Judges pronounced their opinions.

Judge TUCKER. The history of this cause in all its branches, as spread upon the record, is complicated, and most of the facts appear very uncertain.

The bill charges that *Williams Coles*, grandfather of the appellee, *Walter Coles*, the elder, being informed that his son *Walter* was paying his addresses to a young lady whom he supposed to be entitled to a considerable fortune, on the 4th of *September*, 1768, wrote the following letter to *Mrs. Darracott*, then a widow, and mother of the young lady.

*Coleshill, Sept. 4, 1768.*

"Madam,

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daughter, which is very pleasing to his mother and me. I intend giving him *now* to the value of 3,000*l.* current money, in lands, slaves, and other things. At mine, and his mother's death, will *leave* him the *land I now live on, with my possessions in Ireland, and some slaves.* I am, &c.

"W. Coles."

It may not be improper here to state, that *Coleshill*, the place where the writer then lived, is affirmed in the answer of *Mary Payne*, (the defendant in one of the suits, which were heard together in the Court of Chancery,) to have been the property of *Lucy Coles*, the wife of *Williams Coles*, the writer of the letter: and that she, having been married to a former husband named *Dabney*, had by him a son called *William*, who dying, has left a son of the same name still living, and heir at law to the said *Lucy Coles*; his grandmother.

The marriage between *Walter Coles* and Miss *Darracott* took effect not long after the date of the above letter. On the 28th of *March*, 1769, *Walter Coles*, being ill, made his will, which was proved and admitted to record in *October* following, by which he gave to his wife the property which he had with her as a marriage portion, and ten pounds for mourning; and then "gave and bequeathed to his father and mother all and singular the remaining part of his estate of *any nature or kind soever*, to them and their heirs for ever, and constituted his father his sole executor."

A few months after this, *Walter Coles*, the present appellee, and the only issue of that marriage, was born; not long after which a suit was brought in his name and behalf, by *Isaac Winston*, his guardian, for a specific performance of the *promise contained in the before-mentioned letter*, then in the complainant's possession. *Williams Coles*, the defendant, put in an answer thereto, admitting the letter; which is sworn to the 17th of *September*, 1771. The deposition of *Elizabeth Darracott*, the complainant's grandmother, appears to have been taken the 8th of *February*

preceding; but by what authority does not appear. That of *William Darracott*, her son, appears to have been taken the first of *June*, 1780. The magistrates certify that it was taken in that suit, "according to law." The suit appears to have been no further proceeded in. *Mr. Wickham*, of counsel for the appellee, *Coles*, objected to the admission of that bill as evidence in the cause. This I think brings the case within a narrower compass.

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*Williams Coles* died intestate, leaving the appellee, *Walter Coles*, his heir at law: he left also two daughters, from one of whom the appellants, *John Payne* and *Mary Jackson*, are descended, the latter being the daughter of *Mary Payne*, sister of *John*, the other appellant.

*Lucy Coles*, the widow of *Williams Coles*, and grandmother of the appellant, *Walter*, being the mother of his father, and one of the objects of his bounty in his will, survived her husband, *Williams Coles*, several years, and died testate, having made a will bearing date *March 5th*, 1784, which was proved and admitted to record, *May 5th*, 1785. By that will, after several inconsiderable legacies, "she gave all the remainder of her estate, also her ready money, to her grandchildren *Mary* and *John Payne*; (above named;) also one hogshead of tobacco which was in hand." She also appointed *Mrs. Surah Syme*, wife to *Col. Syme*, trustee and manager for her daughter, *Mary Payne* (who then resided in *Philadelphia*) and her children, (*John* and *Mary* above named,) and appointed several executors; of whom, as it is said, her grandson *Walter Payne* alone qualified, and soon after removed himself out of the state, and went beyond seas, without ever possessing himself of any part of her estate, and has never since been heard of.

The bill, which was originally brought by *John Payne* and *Mary Payne*, infants, by *Mary Payne*, their mother and next friend, suggests that *William Darracott*, the uncle of the defendant, *Walter Coles*, having obtained letters of administration on the estate of *Williams Coles*, the deceased husband of *Lucy*, previously to the probate of her will, had

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as *evidence* in this suit was very well founded; there being no sort of privity that I can discover between the present appellants and the defendant in that suit. But, although that record, for the reason just mentioned, ought not to be admitted as *evidence* in this cause; yet it furnishes a circumstance which, I conceive, might have led the Chancellor to direct an issue to determine whether *Williams Coles* did, or did not, write the letter charged in the appellant's bill; inasmuch as the object of the bill, thus brought by the guardian of the appeller, was to establish the existence of that very letter, and to obtain a specific performance of the promise therein contained, in behalf of his ward: referring to the said letter as then in the complainant's possession: and the answer of *Williams Coles* to that bill, which answer is on oath, confesses that he did write such a letter.

The letter of Mr. *Williams Coles* to Mrs. *Darracott* (as charged in the bill) contains, in my opinion, a promise founded upon a valuable consideration, the proposed marriage between his son and her daughter, which, although not made either to his son, or to the young lady, would, upon their intermarriage, *enure* to the benefit of *both*; and might also *enure* to the benefit of the *issue* of *their marriage*, if not performed during the continuance of it; which promise a Court of Equity might enforce in such manner as might be most beneficial for the parties claiming and entitled to the benefit thereof: (a) for, as the former part of the promise contained no specific description of the things meant to be given as a portion immediately upon the marriage, but merely a promise of giving *lands, slaves, and other things*, to the value of 3,000*l.*; if *Walter Coles* had died intestate, leaving his *wife* and *several* children living, I conceive that, upon a bill brought by these parties against the grandfather for a specific performance of his promise, a Court of Equity would have decreed such a performance thereof (by apportioning the lands, slaves, and money to be conveyed, purchased or paid,) as would *enure* to the benefit, not only of the *heir* at law, but of the *younger* children, and the *widow*:

(a) See *Tabb v. Archer*, 3 H. & M. 399. *Chichester's Ex'r v. Vass's Adm'r*, ante, p. 28.

the marriage portion, which she brought, being one of the inducements to the promise; and the younger children entitled to participate, with the heir, in whatever slaves or personal property might have been intended to be given. As to *Coleshill*, if it belonged to the grandfather, that part of the promise would have enured exclusively to the benefit of the heir at law. So, probably, would the promised possessions in *Ireland*. With which we have nothing now to do.

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Again; as this was a promise which a Court of Equity would enforce, and execute, so, also, was it capable of being *released*, entirely, by the husband in his life-time; or by his last will and testament wherein he should make such a provision for his widow as she should accept. It might be questionable how far a *release* made by a last will and testament would in this case have barred the widow's claim to a specific execution of a marriage promise, made in consideration of the portion which she brought to her husband, if she had renounced all benefit under the will of her husband, and brought a bill against his father for the performance of his promise: but, as she did not, but has altogether acquiesced under her husband's will, it is unnecessary to consider that question.

It appears that the devise in *Walter Coles's* will of all and singular the remaining part of his estate of any nature or kind soever to his father and mother, and their heirs for ever, operated as a release to the father, of the *obligation* contained in his letter to Mrs. *Darracott*, as far as the same was not executed, in his life-time, by the gift of *lands, slaves, and other things*, to the value of 3,000*l.*: for, *quoad hoc*, the promise was a *chose in action*; and, by a bequest thereof to the husband and wife jointly, if the subject thereof had been in the hands of another, and the husband had received it, or reduced it into possession, the *whole* would have rested in him *jure mariti*. But the husband being the person liable to the action on account of this *chose in action*, and the same being given to him and his wife,

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the action is thereby extinguished for ever: for he can neither sue himself, nor can his wife sue him: the bequest, therefore, must operate as a release; for if an action be released for an hour only, it is extinct for ever. (a)

(a) Co. Litt.  
280. a.

But, with respect to the land at *Coleshill*, if it, in fact, did belong to *Williams Coles*, the promise, on his son's marriage, vested in him an equitable title to the same on his father's death, which was devisable by his will, according to

(b) Prec. in  
Ch. 330. S. C.  
1 Pow. on De-  
vises, 205.

the authority of *Greenhill v. Greenhill*, 2 *Vernon*, 679. (b)

(c) 2 BL Com.  
182.

The same, I presume, may be said of the *possessions* in *Ireland*. In this case, then, there being a devise in fee-simple to husband and wife, they were properly neither joint-tenants, nor tenants in common: for, being considered as one person in law, they could not take the estate by moieties, but both were seised of the *entirety, per tout et non per my*; the consequence of which was, that neither husband nor wife could dispose of any part thereof without the assent of the other, but the whole remained to the sur-

(d) See *Wal-*  
*lace v. Tallia-*  
*ferro*, 2 *Call*,  
470.

vivor. (c) So that, whether the *Coleshill* lands were originally the property of *Williams Coles*, or of his wife *Lucy*, the fee-simple thereof was in the latter at the time of making her will, and passed to the appellants under the residuary clause in her will. But, as to the slaves and personal property of *Walter Coles*, the son, I conceive that, if they were reduced into possession by his father in his life-time, as *legatee*, (and not merely as *executor* of his son,) (d) the right of his wife thereto was merged in the marital rights of the husband; and consequently did not survive to her as the right in the lands would.

But here we must consider an objection, upon which the decree of the Chancellor, dismissing the appellant's bill, was probably founded, viz. that the existence of the letter from *Williams Coles* to Mrs. *Darracott*, as charged in the bill, is neither admitted by the answer, nor proved by any other evidence whatsoever; and, secondly, that it is not proved that the inheritance of *Coleshill* was in Mrs. *Lucy Coles*, instead of her husband.

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It is very true that the defendant *Walter Coles* has not in his answer expressly admitted the letter; neither has he directly or indirectly denied it. He refers, for *greater certainty*, to such proof as the complainants can bring concerning the same; and, as I have before observed, speaks of the letter in various parts of his answer in such a manner as manifests no doubt of its existence. The appellants, or their counsel, probably relying that the bill exhibited by the appellants' guardian for the purpose of establishing and enforcing a specific performance of the promise contained in that letter, would be admitted as evidence not only to establish its existence, but the fact that it was in the appellee's possession, have not given themselves the trouble to exhibit any other proof of it. Under these circumstances, I doubt whether the Chancellor ought not to have directed an issue to inquire whether such a letter was ever written by *Williams Coles*, or not. So, also, with respect to the title which *Lucy Coles* had to the estate at *Coleshill*, which her daughter *Mrs. Payne*, one of the defendants in the cross-bill, who answered in behalf of the appellants, her children, as well as of herself, states to have been the original inheritance of her mother. This, as not being responsive to any direct charge in the bill, may not be such evidence as is sufficient to establish that fact; and yet I am inclined to believe it ought to have led the Chancellor to direct an inquiry into the nature of her title to that estate; as also, what other estate real or personal she was seised or possessed of, as of her own property, at the time of making her will; the residuary clause of which appears to me to furnish sufficient reason for such an inquiry, and to be sufficient to pass the same to her residuary legatees.

I am, therefore, of opinion that the decree of dismissal ought to be reversed, and the cause sent back, with directions conformable to what I have said.

Judge ROANE. The counsel for the appellants rightly considered this case under two aspects; 1st. As relative to



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any right to real property which the appellants, as claiming under old Mrs. *Coles*, may have by virtue of the letter mentioned in the proceedings; and, 2dly. As to such other real property as that lady might have had a right to as of her own separate inheritance.

As to claims to *personal* property, it is not shewn nor pretended that any such existed in her favour which were not reduced by her husband into possession during the coverture.

With respect to both the first-mentioned descriptions of claims, the first question is, whether the proceedings in the suit brought by the appellee against his grandfather during his minority in *Hanover* Court, to which his grandmother was no party, and which is particularly objected to as evidence by the appellee, in the court below, were competent to bind her; and I am of opinion they were not, inasmuch as in respect of *real* property a wife has, as it were, a separate existence, and therefore must be made a party to a suit respecting it before it can bind her. It is also a rule of evidence that no person can take the benefit of the proceedings in any suit, or any verdict, who would not have been prejudiced thereby, if it had gone against him. (a) The consequence of this principle applied to the present case is, that the appellants, as claiming under old Mrs. *Coles*, cannot give in evidence any of the proceedings in the before-mentioned suit: there is, consequently, no testimony whatever left remaining in the cause, to establish the existence, or the extent of the marriage promise on which the appellants' pretensions are bottomed: the admission of the appellee (from report) of the possibility, or even probability, of such a letter, cannot have such effect, as he expressly calls on the appellants to prove their case in this particular, and in truth admits *nothing*, as to the purport or extent of that letter. The claim of the appellants, therefore, as arising under the marriage promise, is left without any foundation to rest on.

With respect to a claim of land as of the separate inheritance of old Mrs. *Coles*, that seems to be a *new* idea. Such

(a) 2 Bac. 616  
and 1 H & M.  
174. *Baring*  
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a claim is not advanced, nor charged, in the bill before us, and is wholly unsupported by any testimony, if we except some *general* expressions, as to this point, of Mrs. *Payne*, the guardian of the appellants, in her answer to the suit brought in *Hanover* Court, to set aside old Mrs. *Coles's* will: but the rule is well settled, that the answer of a defendant in Chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand, but that, in such case, he is as much bound to establish it by independent testimony as the plaintiff is to sustain his bill. On this subject I would refer to the case of *Beckwith v. Butler*, 1 *Wash.* 224. as expressly in point. In that case, an executor, when called on to account and to say what were the particulars and amount of the estate of the testator, swore that a part of that estate was his (the executor's) property, by reason of a gift to him by the testator; and there being no other testimony of this gift, it was held by this Court to be *monstrous* to permit an executor to swear himself into a part of the testator's estate.

I must, therefore, also say that there is no evidence in this cause of any separate property having existed in old Mrs. *Coles*, in any of the lands of which her husband was possessed. The *general* calls in the appellee's bill in *Hanover* Court which were relied on to justify the answer in this particular, on the ground of its being responsive to the bill, are perhaps far less competent to have that effect than the call for an account was in the case of *Beckwith v. Butler*.

I am of opinion, therefore, to affirm the Chancellor's decree, upon the testimony in this cause: but, were this testimony even supplied, my opinion on the merits would not be different.

Admitting that, in point of sheer law, the interest of this land would have passed (had the land been ascertained and *identified*) both by the wills of *Walter Coles* and old Mrs. *Coles*, I am strongly inclined to believe that in neither case was it *intended*. With respect to the former will, we are now in the dark: but with respect to the latter, while

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there is, on one hand, no *iota* of testimony, to shew that the testatrix ever considered *this* as *her* property, there is on the other hand abundant testimony proving that she considered it as the property of the *appellant*. Under these circumstances, therefore, the aid of a Court of Equity ought not to be afforded to frustrate the *expectations* of the testatrix herself, as well as wholly to disinherit, in favour of strangers, the only *issue of that marriage*, to further and promote *which* the promise in question is supposed to have been made. Besides, independent of all testimony on this point, it is scarcely credible, as *upon the face of the will* itself, that *this* property was contemplated: for, while this good lady was particularly parcelling out her shoebuckles and teaspoons, &c. among her descendants, it is hardly to be believed that she would not have also *particularly* designated this *immense* interest, had it been so designed or intended.

With respect to directing an issue as to the marriage promise in this case, we are told, 2 *Foub.* 494. that, where the evidence is *full*, the Court will not direct an issue at law at all: and so, *è converso*, I presume, an issue will not be directed, when the claim is altogether unsupported by testimony, which is the case before us.

As to an issue respecting Mrs. *Coles's* separate inheritance, we are told in the same book, p. 495. that an issue ought not to be directed to try a title *not alleged* in the plaintiff's bill: and, although it is added, by way of exception, that if a matter does *appear* to the Court, at the hearing, which goes to the very right, the Court will *sometimes* order an issue to try it; yet, in the case before us, the matter in question does not legally *appear* to the Court, by reason of the objection to the affirmative character of the answer in this particular as aforesaid.

Judge FLEMING. The claim of the appellants to the estate in controversy is founded on a letter, containing a marriage promise, charged in their bill to have been written by *Williams Coles*, grandfather of the appellee, and addressed to *Elizabeth Darracott*, when a marriage was about

to take place between *Walter Coles*, son of the former, and *Mary Darracott*, daughter of the latter, (which marriage took effect,) and the subsequent will of *Walter Coles*, the son, dated the 28th of *March*, 1769. And they come into a Court of *Equity* to assert their right.

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The first point made in the cause, by the appellants' counsel in their statement, is of *seeming* importance, to wit, "that *Williams Coles* could dispose of no part of the lands which descended to *Lucy* his wife, by inheritance," or to which she was entitled in her own right "by purchase." But there is neither proof, *nor charge in the bill*, that any of the lands in the seisin of *Williams Coles*, were either the inheritance or purchase of *Lucy* his wife; and all that appears in the record on that subject is in the answer of *Mary Payne*, to the bill of the appellee to set aside his grandmother's will; wherein she uses this expression—"notwithstanding that the greater part of the *Virginia estate*, then in question, and now in question in this Court, was the inheritance of the said *Lucy*:" which I conceive to be a mere idle suggestion that ought to have no effect on the cause.

It is the unanimous opinion of the Court, that no part of the record in the suit brought in *Hanover* Court, by the guardian of the appellee, in his behalf, in the time of his early infancy, is proper or admissible evidence in this cause: and *that* being altogether rejected, it may, with propriety, be asked, where is the evidence to be found to prove the existence of the letter, or to substantiate the marriage promise charged in the bill? There is none that proves it to my satisfaction. And, as to directing issues to try whether any of the land in question was the inheritance of *Lucy Coles*, the appellee's grandmother; and whether such a letter from *Williams Coles* to Mrs. *Darracott*, as stated in the bill, did exist; I think it improper to direct an issue to try any fact not charged in the bill; and I am not for hunting evidence that may tend to deprive an only child of the estate and inheritance of his father, in whose

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will (it must be obvious to every one) he was pretermitted, solely, for want of knowledge in the father, when he made his will, or at the time of his death, that the mother was in a state of pregnancy. Any other supposition would be against every principle of justice, natural affection, and humanity. Nature has implanted in the *birds* of the air, and in the *beasts* of the field, a strong affection, and tender regard for their own offspring. And, had the marriage promise been sufficiently proved, as stated in the bill, I might, perhaps, have been of opinion that, in *equity*, it ought to operate in favour of any *issue* that might be the fruit of the marriage; for such *issue* must, undoubtedly, have been in the contemplation of the parties to the contract at the time of making it: and I should have made a long pause, before I could have decided in favour of the appellants, to the exclusion of the appellee from any part of the estate, rights and interests of his father. And such have been the impressions of our Legislature on the subject, that, so long ago as the year 1785, in the "*act concerning wills and the distribution of intestates' estates*," ample provision is made for *posthumous* children, and such as are pretermitted in any last will and testament, though in life at the death of the testator.(a)

(a) 1 Rev.  
Code, c. 92.  
s. 3.

I am of opinion, upon the whole, that the decree is correct, and ought to be affirmed.

Thursday,  
November 8.

### Chapmans against Chapman.

UPON an appeal from a decree of the late Judge of the Superior Court of Chancery for the *Richmond District*, in . A record of one suit cannot be read as evidence in another, on the ground that the *defendants* and one of the *plaintiffs* in the latter suit were parties to the former, and that the same point was in controversy in both; *another plaintiff*, and the person under whom both the said *plaintiffs jointly* claim, not having been parties to such former suit.

2. In such case, the circumstance that the "*writings and evidences*" in the former suit were read at the hearing of the latter, without any exception taken at that time appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the appellate Court; the defendant in his *answer* having objected to the admission of the *verdict and other proceedings* in the former suit, but *offered* to agree that the *depositions only* might be read; to which offer no assent appeared on the part of the plaintiff.

a suit brought by *Nathaniel Chapman* against *George Chapman*, sen. his uncle, and revived, on the death of the said *Nathaniel*, by a bill of revivor on behalf of *George Chapman*, jun. and *John Chapman*, his brothers and co-heirs.

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The original bill stated that *Nathaniel Chapman*, grandfather of the plaintiff, and a second *Nathaniel Chapman*, heir at law of that grandfather, had successively died seised and possessed of a very considerable real and personal estate ; and that, upon the death of the latter, the same descended to *Pearson Chapman*, whose eldest son and heir at law the plaintiff was : that *Constant Chapman*, widow of the elder *Nathaniel*, (whose children were the second *Nathaniel*, the said *Pearson*, *George* the defendant, and sundry daughters,) prevailed on the said *Pearson* to convey to the said defendant, by three deeds, a tract of land in *Fairfax* County, some lots in the town of *Alexandria*, and a tract of land, lying in *Fauquier* County, called the *Pig-Nut* tract; by promising to secure to him, either by will or deed, as much, or nearly as much, of the estate which then was at her disposal, as she should leave to the said defendant ; that these deeds expressed the “ consideration of *natural love and affection*, and of ten shillings current money, paid to the said *Pearson* by the said *George* ;” but the *actual*, or *principal* consideration was the *promise* aforesaid ; that two of the three deeds were acknowledged by the grantor, in open Court, in the year 1766, and duly recorded, but the third (which was for the *Pig-Nut* tract) was acknowledged in the presence of *two* witnesses only ; that, having seen his mother’s will, giving *nearly all* her estate to her son *George*, the defendant, the said *Pearson* obtained that deed, and suppressed it ; that the defendant had sued the said *Pearson* in the County Court of *Fauquier*, to compel a renewal of that deed ; and that suit abating by the death of *Pearson*, brought another in the High Court of Chancery against *George Chapman*, jun. his devisee ; that, in the year 1793, *George Chapman*, jun. claiming as devisee, commenced an action of ejectment, for the said *Pig-Nut* tract of land, in the District Court

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of *Dumfries*, against the said *George Chapman, sen.* who thereupon filed an amended bill, in the High Court of Chancery, praying an injunction to stay proceedings on the ejectment; which was granted upon the condition of confessing a judgment at law, and relying upon his equitable title alone; (in which bill of injunction he alleged that the number of witnesses to the deed for the said *Pig-Nut* tract, not being sufficient to have it admitted to record, it was returned to *Constant Chapman* to get it more fully authenticated, and was, for that purpose, by her delivered to her son *Pearson* the grantor; under a solemn assurance from him that he would acknowledge it in the presence of a third witness, and return it to her; instead of doing which, he had destroyed it, on the pretext that he had found a will, executed by her, wherein she had violated her promise; made him when he executed those deeds; having left him no part of her estate, or, at most, a very inconsiderable legacy;) that the said *George Chapman, jun.* the devisee as aforesaid, answered, and stated the said *Pearson's* motive for executing the deed which he had afterwards suppressed; that, after taking much testimony on both sides, the Court directed an issue to be tried to ascertain whether the said *Constant* made the promise before mentioned; and the Jury found that she did; that, thereupon, the Chancellor dismissed the said bill of injunction, and *George*, the devisee, obtained possession by virtue of the judgment in ejectment; which decree of dismissal was affirmed by the Court of Appeals.

The bill proceeded to state that the record in the said suit between *George Chapman, sen.* and *George Chapman, jun.* so far as the same concerns the said promise, had an intimate connection with the present suit; the present defendant having been a party thereto, and having had an opportunity of cross-examining all the witnesses: it therefore prays that the said record, with all the exhibits in that suit, may be taken as part of this bill, and that all matters contained therein, tending to the establishment of that promise, may be received as proper evidence in this cause; averring

that the *promise* so found by the Jury in *that* suit was never complied with, but fraudulently broken by the said *Constant Chapman*; and therefore that the said deeds were obtained from him by *fraud*.

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The prayer of the bill was for a *full answer to the premises*, a surrender of the deeds, and general relief.

The defendant *answered* very fully; admitting the possessions, deaths and intestacies of the two first *Nathaniel Chapmans*, and the descent on *Pearson Chapman*; but denying that *Constant Chapman* made the promise mentioned in the bill; and alleging that *Pearson Chapman* could not have seen his mother's will before he refused to return the deed for the *Pig-Nut* tract; for the refusal was in 1766, and the will was made in 1767. He *objected to the admission of the verdict, and proceedings in the former cause*, as evidence in *this*; but was "*willing to consent that all depositions in the said suit should be read by mutual consent; a right being retained to either party to examine such of the same witnesses as are now alive, and to exhibit other new testimony.*" *No such consent appears to have been given on the part of the plaintiff.*

To this answer there was a general replication; after which the plaintiff died intestate, and the suit was revived by his co-heirs above mentioned; the bill of revivor, praying "that the suit and the proceedings therein stand revived in their names, and be in the *same plight* and condition they were in at his death;" and seeking also a discovery of rents and profits. The defendant answered this bill; discovering, in general, the rents and profits, and averring that they arose principally from the possessor's improvements. Commissions were awarded, (without any replication to the last answer,) and some depositions were taken.

The cause came on finally to be heard, "*on the writings and evidences formerly read in the cause between two of the parties,*" (George Chapman, sen. and George Chapman, jun.) "and on the the present bill and answer;" on consideration



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This case was argued by *Warden* and *Wickham*, for the appellants, and *Botts* and *Wirt*, for the appellee. Many points were made, and elaborately discussed: but the decision of this Court having turned on one point only, and that being sufficiently illustrated by the ensuing opinion of Judge *TUCKER*, (with which the other Judges agreed,) the arguments of counsel are omitted.

*Saturday, November 30.* The Judges pronounced their opinions.

Judge *TUCKER*, after stating the case, proceeded as follows.

A preliminary question in this case is, whether the record, verdict, depositions and exhibits in the before-mentioned suit between *George Chapman*, the uncle, defendant in the present suit, and *George Chapman* the nephew, one of the parties complainant in the present suit, originally brought by his elder brother *Nathaniel*, and now revived in the names of *himself* and his brother *John*, as co-heirs of *Nathaniel*, are to be considered as evidence in this cause, or not.

The general rule as to giving verdicts and judgments in evidence (a) is, that they are not to be admitted but between parties, or privies; to which general rule there are some few exceptions, one of which is that, where a fact to be proved is such whereof *hearsay* and *reputation* are evidence, a special verdict between other parties stating a *pedigree* would be evidence to prove a descent; for, in such a case, what any of the family, who are dead, have been heard to say, or the *general reputation* in the family, entered in family books, &c. are allowed. (b) But this is not such a case: *hearsay* was never yet permitted as evidence to prove a *promise*, or the *consideration* upon which a deed

(a) See *Pe-gram v. Isabel*, 2 H. & M. 200.

(b) *Bull. N. P.* 231. 233.

was made. The *general* rule, then, must prevail. A corollary from that rule is, that nobody can take *benefit* by a verdict, that would not have been prejudiced by it, had it gone contrary.(a) According to the general rule and its corollary, *Nathaniel Chapman* could not avail himself of the verdict between his younger brother, then in full life, and his uncle; for he was not his heir, nor did he claim the lands *under* him. Neither could he be prejudiced by that verdict between those parties; because he claimed as heir to his father *Pearson Chapman*, whose heir his younger brother was not, nor, as the laws then stood, could be. Consequently, had there been no abatement of the suit, the record and verdict in the former suit, between *George* the uncle, and *George* the brother, could not have been admitted as proper evidence in this suit. Is the case altered by the abatement, and the revivor in the names of *George* the brother and *John* his brother, as heirs of *Nathaniel*? I conceive not. Whatever right *George* the brother might have, in an *original* suit between himself and his uncle *George*, to avail himself of that verdict, he is to be regarded, in the present suit, only as ONE OF SEVERAL HEIRS of his brother *Nathaniel*, ALL of whom *collectively*, represent that brother as his *heirs*, or more properly as his HEIR; according to the known rule of law that *all* the heirs in PARCENARY make but ONE HEIR.(b) As, therefore, he comes to revive and continue the suit *jure representationis*, the suit must remain in the same plight and condition, according to the prayer of his bill of revivor, as if his brother *Nathaniel*, the original complainant, were still alive.

Again; whatever *personal* right *George* might have to avail himself of that verdict, that right was not communicable to another, not claiming as a *privy* under him. Therefore *George*, in a joint suit brought by himself and his brother *John*, who does not claim *under* him, but *independently* of him, cannot be entitled, from the bare circumstance of their being joint complainants in the same suit, to commu-

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(a) *Hard.* 472.  
*Gill. Evid.*  
34, 35. *Vis-*  
*countess Pem-*  
*broke v. Cur-*  
*rier.*

(b) *Ch. Litt.*  
163.

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licate to that brother the benefit of that verdict, to which *John* was neither a party, nor privy; and by which he could not possibly have been prejudiced. Therefore, taking the matter either way, I think the record in the former suit inadmissible as evidence in this cause. This case appears to me to be much stronger than that of *Payne v. Coles*, lately decided: in the decision in that case I cheerfully acquiesce, and think it furnishes an additional reason for my present opinion.

As to the *depositions*; the offer by the defendant to admit them to be read, alone, without the verdict or other parts of the record, not being accepted by the complainant, who insisted on the whole being admitted as evidence, the matter remains as if no such offer was made; and the same reasons will apply for rejecting *them*, as for rejecting the verdict.

I am therefore of opinion that the decree be affirmed.

Judge ROANE would have assigned his reasons for affirming the decree, had they not all been anticipated in the opinion just delivered. He contented himself, therefore, with expressing his concurrence; observing that the record of the former suit was not admissible as evidence in this; and, *that* being excluded, there was no evidence to prove the promise, alleged in the bill to have been made by *Constant Chapman*, on which the plaintiffs' claim is founded. Of course, the bill was properly dismissed.

Judge FLEMING. It is the unanimous opinion of the Court that the decree dismissing the bill be AFFIRMED.

Mayo against Turner.

Thursday,  
October 11.

ON a petition of *John Mayo* to the County Court of *Hanover*, for leave to erect a water grist-mill, the Jury, on the writ of *ad quod damnum*, found that "it is probable that the health of the families of *Lewis Turner* and of *William Ragland*, who live near the pond, if the mill is erected, will be annoyed by the stagnation of the waters." The County Court, "after hearing witnesses, and weighing all the circumstances," decided that leave should not be granted to build the mill; and that decision was affirmed by the District Court, upon inspection of the record, without hearing evidence; whereupon *Mayo* appealed to this Court.

The finding of a Jury, in a mill-case, that "probably the health of certain families who live near the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner.

*Peyton Randolph*, for the appellant, on the authority of *Home v. Richards*, (a) contended that the District Court (a) *2 Call, 507*, ought to have heard the evidence of witnesses, and not to have determined the cause on inspection of the record only, whereby the appellant was precluded from offering testimony which might have produced a different decision.

*Wirt*, contra, relied on the 5th section of the act of Assembly, (b) as conclusive for the appellee, and said there was nothing against him in the case of *Home v. Richards*.

(b) 1 Rev. Code, p. 198.

Friday, October 12. The Judges pronounced their opinions.

Judge TUCKER. The only question in this case is, whether the inquest of the Jury finding that the health of certain persons in the neighbourhood, of whom the appellee's family were a part, will be annoyed by the erection of a mill-dam, &c. be conclusive against the petitioner; or whether it be competent for him to examine witnesses to impugn that finding.

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Turner.

The second section of the act concerning mills, after directing several distinct matters to be inquired of by the Jury, concludes with a direction that they shall certify whether in *their* OPINION the health of the neighbours will be annoyed by the stagnation of waters.

The fifth section enacts, that " If, *on such inquests*, or on OTHER *evidence*, it shall appear to the Court that certain inconveniences may result, *or the health of the neighbours be* ANNOYED, they SHALL NOT *give leave* to build the mill and dam.

From hence it appears to me that if the *opinion* of the Jury be *affirmative*, (as in the present case,) that the health of the neighbours will be annoyed, the same is *conclusive* against the party applying to build the mill: but that, if it be merely *negative*, a person supposing himself likely to be aggrieved thereby may controvert such opinion of the Jury by *other evidence*; and if, by such *other evidence*, it shall appear to the Court that the health of the neighbours will be annoyed, they are bound by the terms of the law not to give leave to build the mill.

Judge ROANE was of the same opinion, and observed that the finding of the Jury was *substantially* that the health of the neighbours would be injured.

Judge FLEMING. It is the unanimous opinion of the COURT that the judgment be affirmed.

November 2.

Saunders *against* Wood, late Governor.

Same point  
decided, as in  
*Leftwich v.*  
*Berkeley*, 1 H.  
& M. 61.

THIS case depending upon the same principles as that of *Leftwich v. Berkeley*, 1 H. & M. 61. the judgment against the appellants was reversed by the whole Court, (consisting of all the Judges,) for the reasons given in that case.

**Sutton against Mandeville.**

Thursday,  
October 18.

SUTTON brought an action against *Mandeville* for the use and occupation of a house in *Alexandria*. First count, *indebitatus assumpsit* for the use and occupation of the house for the space of — years: Second count, in consideration that the plaintiff had, at the special instance and request of the defendant, before that time permitted him to hold and occupy another messuage or dwelling-house of the said plaintiff with the appurtenances, &c. and that the said defendant had, according to that permission, held and occupied the same for a long time, to wit, — years, before then elapsed, the defendant undertook, and to the plaintiff faithfully promised, to pay the plaintiff so much money as he reasonably deserved to have, &c. and avers he deserved other five hundred dollars, &c. On *non assumpsit* pleaded, the Jury found a verdict for the plaintiff for 500 dollars damages, subject to the opinion of the Court whether it was necessary for the plaintiff in that action to prove an *express* promise to pay some rent for the house: if *such* promise be necessary, they find for the defendant. The District Court decided in favour of the defendant; from which judgment the plaintiff appealed.

*Assumpsit for use and occupation of land, by permission of the plaintiff, lies on an implied, as well as express promise.*

Thursday, October 25. The Judges pronounced their opinions.

Judge TUCKER. In considering a similar question to the present in the case of *Eppes v. Cole*, 4 H. & M. 161. (except that in that case an express promise that the plaintiff should be paid to his *satisfaction* was proved,) I had occasion to cite a passage from *Wooddeson's Lectures*, vol. 3. p. 152. in which he says that such an action as this is maintainable, to obtain a recompense for the occupation of the plaintiff's land, by his permission, where there is *no* stipulation for any precise rent; and adds, that scarce any

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thing is more usual than such an action of *assumpsit* for the use and occupation of the plaintiff's house by his permission. I cited also the opinion of Judge *Buller*, in the case of *Birch v. Wright*, '1 T. R. 387. in corroboration thereof. He there said, the action may be maintained either upon an express or an *implied* promise. I beg leave to refer to the case itself for further particulars; and shall conclude with giving it as my opinion, that the judgment of the District Court is erroneous, and ought to be reversed, and judgment rendered for the appellant.

Judges ROANE and FLEMING were of the same opinion.

BY THE WHOLE COURT, judgment reversed, and directed to be entered for the appellant, according to verdict.



Wednesday, Marine Insurance Company of Alexandria against  
October 17. Stras.

1. A marine insurance, "at and from Norfolk to Curra-  
coa, with li-  
berty of going  
to any other  
island in the  
West Indies,  
or any one port  
on the Span-  
ish Main, and  
at and from  
thence back  
to Richmond,"  
must be un-  
derstood as an insurance "at and from Norfolk to Curra-  
coa, in the first place, with liberty  
of going from Curra-  
coa to any other island," &c.

THIS was a controversy about a return of premium upon two policies of insurance effected by *William Hodgson*, on behalf of *George Frederick Stras*, on a voyage "at and from Norfolk to Curra-  
coa, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond;" the first policy being "upon any kind of lawful goods and merchandise, valued at 6,000 dollars, laden or to be laden on board

2. If, therefore, the vessel put into the island of *St. Thomas*, and thence return to *Norfolk*, without ever going to *Curra-  
coa*, it is a deviation from the voyage; and, there being no proof that such deviation was occasioned by stress of weather, or other unavoidable accident, the person insured is entitled to no return of premium; such being the terms of the policy.

3. A protest before a Notary Public, by the master of the vessel, after his return to *Vir-  
ginia*, is no evidence in such case: and *quere*, would such a protest, made at *St. Thomas's*, have been any evidence; the person who made it being *alive*, and no impediment to prevent his deposition from being regularly taken?

the good schooner called the *Sophia*, *George C. Leacy*, master, and to continue and endure until the *said goods and merchandises should be safely landed at Richmond aforesaid;* the *second*, "upon the body, tackle, apparel and other furniture of the said schooner, valued at 4,500 dollars," and to continue "until the said vessel be safely arrived at *Richmond aforesaid*, and until she be moored twenty-four hours in good safety."

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In each policy there was a clause expressing that "it should and might be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather, or other unavoidable accident, without detriment to the insurance." The rate of premium was 27 1-2 *per cent.* "to return five *per cent.* if the vessel did not proceed to a *second port*, and five *per cent.* (a) if the property returned in the said vessel, (b) and no loss happened: in all cases of return premium, one half *per cent.* on the sum insured to be retained by the assurers: and it was mutually agreed by the parties, in each policy, that no part of the premium should be returned, or abated, on account of any deviation which should be made by the owners, or their factors, from the present voyage."

(a) If she was not sold (in the policy on the vessel.)  
(b) In the policy on the cargo.

*Hodgson*, the agent of *Stras*, having, on the 2d of December, 1799, given his own note negotiable at the Bank of *Alexandria* for the amount of the premium being 2,754 dollars, with *James Patten* and *James Dykes*, endorsors, payable in six months; *Stras*, on the 13th of May, 1800, filed a bill in the late High Court of Chancery against *The Marine Insurance Company* and the said *Hodgson*, and obtained an injunction to inhibit the defendant *Hodgson* from paying 1,825 dollars, part of the said note, until the further order of that Court.

The bill stated that "the said schooner, while on her direct course to *Curraçoa*, was chased by an armed vessel, which overtaking her fast, the Captain, to escape being captured, thought it most prudent to put into the island of *St. Thomas*, then not far to the leeward, where he arrived in



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safety; that, on his arrival, he was deterred from proceeding to *Curraçoa*, from the information he had, of the way thither being greatly infested with privateers, so as to render it almost impossible to have escaped capture, had he continued his voyage; in consequence of which, and by the advice of his supercargo, he thought it for the benefit of all concerned to remain at *St. Thomas's*, sell the cargo, and take a return one, on freight, to *Norfolk*; that he accordingly did so, and left *St. Thomas's* on the 11th *December*, and arrived at *Norfolk* on the 30th of the same month, without touching at any port or place in the *West Indies* other than *St. Thomas's*; that the risk on a voyage to *St. Thomas's* being considerably less than on one to *Curraçoa*, the rate of insurance was of course less, and could have been effected at 10 *per cent.* on the outward voyage, and at the same rate on the return; so that the putting into *St. Thomas's* was a benefit to the insurers, whose risk was thereby considerably diminished. The plaintiff did not claim any thing on account of that difference of risk, but conceived himself, within the express terms of the policy, entitled to a return of 10 *per cent.* on the insurance, (which would amount to 1,000 dollars,) and to a farther deduction of premium on the return cargo, as no return cargo was taken on board, and no risk incurred; (this at 13 1-2 *per cent.* on the said cargo amounts to 825 dollars;) that, on the return of said schooner, it appeared the Captain had neglected to make any protest at *St. Thomas's*, or immediately on his arrival in this country; and, as it was deemed necessary, for obtaining the return premium, that such proof should first be presented to *The Marine Insurance Company of Alexandria*, the Captain was written to at *Norfolk*, and requested to make out a protest stating his reasons for going into *St. Thomas's*; which was accordingly done; as would appear by his protest annexed to and made part of this bill."

*William Hartshorne*, President of *The Marine Insurance Company*, answered, for and in behalf of the said company; averring the true intent and meaning of the policies to have been to insure from *Norfolk* to *Curraçoa*, with liberty, after arrival at *Curraçoa*, to go to any other island in the *West*

*Indies*, or any one port on the *Spanish Main*, and at and from thence to *Richmond*; that so the contract, though a little vaguely expressed, was to be understood *among mercantile men*; that the going to *St. Thomas's*, without ever going to *Curraçoa*, was therefore a *deviation* from the voyage, and a breach of the contract on the part of the insured; on account of which there was, by the terms of the policies, to be *no return of premium*. "The defendant did not admit that the said schooner while on her direct course to *Curraçoa* was chased by an armed vessel, so as to make it necessary or prudent to put into the island of *St. Thomas*, or to excuse the said schooner from proceeding to *Curraçoa*; or that any other sufficient cause for the deviation from *Curraçoa* did exist. If any such sufficient cause existed, the usage of trade, for the purpose of obviating *frauds*, required that the same should have been stated in a *regular protest* at *St. Thomas's* immediately after the arrival of the vessel there. And the said protest should have been subscribed by the master and mate, or master and some of the seamen, and duly *sworn* or affirmed to. Such an instrument would have been entitled to credit; but the protest produced was not entitled to any; having been made at *Norfolk*, and at a considerable distance of time after the alleged cause of deviation had happened." Neither did "the defendant admit that the said vessel returned *empty* from *St. Thomas's*; but saith she brought, *in money*, 592 dollars; so that a deduction of the premium upon the *whole sum home*, (*viz.* 6,000 dollars,) cannot, upon any principle, be correct."

The protest exhibited was the only document (except the two policies) filed in the cause; no *depositions* being taken. In that instrument, the captain sets forth the circumstances which induced him to put into *St. Thomas's*, much in the same manner as alleged in the bill; but does not say whether any *return cargo* was taken on board at that place; though he mentions that it was his *intention*, when he went thither, "*to take, on freight, a cargo for the port of NORFOLK.*" He farther says that he sailed from *St. Thomas's*, and arrived

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at NORFOLK; but says nothing about returning to RICHMOND, at which place, according to the policies, the voyage was to be ended.

The cause was heard on the 8th of *March*, 1804, and the late Chancellor was of opinion that the true construction of the policies was that the schooner *Sophia*, and goods and merchandise *laden or to be laden* on board of it, were insured in a contemplated voyage from *Norfolk* to *Curraçoa*, or some other island in the *West Indies*, and any port on the *Spanish Main* and back again; that therefore the diversion to *St. Thomas's* was no deviation from the voyage. He was also of opinion that the phrase "goods and merchandise *laden or to be laden*" was to be construed as applying to a *return cargo*; and that, *as no return cargo was taken on board*, there ought to be a deduction of premium on that account. He therefore made the injunction perpetual; except as to the 1-2 *per cent.* which the company, by a clause in each policy, was authorized to retain: from which decree the defendants appealed.

*Call and Williams*, for the appellants, relied on two points;  
1. That the vessel was bound to go to *Curraçoa*, before she was authorized to go to any other island in the *West Indies*. Without this construction, that part of the policy which mentions a *second port* (after going to *Curraçoa*) would be senseless. The general course of decision is that, where several ports are mentioned to which the vessel may go, but the *order* in which to take them is *not prescribed*, their geographical position furnishes the rule; but, where a *particular order is prescribed* in the policy, it must be pursued. (a)

(a) *Beatson*  
v. *Haworth*, 6  
Term Rep.  
531. *Marshall*  
on Ins. p. 395,  
396.  
(b) *Senat* v.  
*Porter*, 7  
Term Rep.  
158. *Marsh.*  
616.

2. The *protest* of the master, even if made at *St. Thomas's* immediately on his arrival, would not have been evidence; (b) the person who made it being living. But if any credit should be given to *any* protest, none is due to the protest in this case, which was not recent; nor immediate;

but since this controversy began. Even the *deposition* of the master, taken *ex parte*, would not be evidence.

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*Wickham*, contra. The vessel's going to *St. Thomas's* was no deviation. The contract did not require that she should go to *Curraçoa* first; and, that being silent, she had a right to touch at *St. Thomas's*, which is in the direct route to *Curraçoa*. But, indeed, she was not bound to go to *Curraçoa* at all; and, upon failing to do so, might claim a return of the premium. There are different opinions, whether the insured has a right *not to proceed* on the voyage: but the law is laid down that he *has* such right; and, in case he chooses to exert it, the premium ought to be returned; for *risk* is the essence of the contract;(a) and it is not necessary to stipulate for a return of premium, where *ex aequo et bono* it ought to be returned.(b)

(a) *Marshall*,  
563, 564.

(b) *Marshall*,  
565. 568. 5  
*Burr.* 1237.  
*Stevenson v.*  
*Snow.*

As to the *evidence*. The protest was read at the hearing, and not excepted to. If an objection had been made, we might have regularly taken the deposition of the captain. The protest, therefore, ought to be received. But if it be not evidence, the only effect should be to open the cause, and give the parties leave to take their testimony again. As the case now stands, rejecting the protest, there is no proof of the *deviation*; for the *policies* prove nothing;(c) and then there is nothing to prevent a return of premium.

(c) *Marshall*,  
611.

*Argument in reply*. The principle, that, where there is no stipulation to the contrary, and the risk is not run, the premium shall be returned, does not apply to this case: for here the stipulation is *express*, that, in case of deviation, there should be no return of premium.

The plaintiff states in his bill that he went to *St. Thomas's* from *necessity*. The answer admits that he went there but denies the *necessity*. The *plaintiff* then must *prove* it: the burden of proof does not lie on the *defendants*. The evidence on the part of the plaintiff being altogether illegal, it was not necessary for us to make an objection in the Court below: for the rule is that, where a party means to object

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to a paper which on the *face* of it *appears* to be *evidence*, he must *shew* his objection: but that is not necessary as to a paper which, *on its face*, is *no evidence*. Mr. Wickham's position that the cause should be sent back, and leave given to the parties to take new testimony, would produce an endless circle of litigation. Where the parties are prepared and go to trial, this Court must take the record as it stands, and, if no evidence appears in support of the decree, it must be reversed.

Friday, October 26. The Judges FLEMING and TUCKER (Judge ROANE not sitting in the cause) pronounced their opinions.

Judge TUCKER. This was a bill brought by the appellee *Straa*, for a return of premium on the schooner *Sophia* and her cargo "at and from *Norfolk* to *Curraçoa*, with liberty of going to any other island in the *West Indies*, or any one port on the *Spanish Main*, and at and from thence back to *Richmond*."

The bill suggests that the schooner, while on her direct course to *Curraçoa* was chased by an armed vessel, which overtaking her fast, the Captain, to escape being captured, put into the island of *St. Thomas*, then not far to the leeward, where he arrived in safety; that he was deterred from proceeding to *Curraçoa* from information that the way thither was greatly infested with privateers, so as to render it almost impossible to escape capture. He therefore sold his cargo at *St. Thomas's*, and took a return cargo on freight to *Norfolk*, where he arrived on the 30th of *December*, 1799, without touching at any port or place in the *West Indies*, other than *St. Thomas's*. There was a condition in the policy for a return of premium in case the *Sophia* should not proceed to a *second* port; and also for a further return if the property (the cargo) should return in the vessel, and no loss should happen.

The policies contain two other material clauses; "first, that it shall and may be lawful for the said vessel in her

voyage to proceed and sail to, touch, and stay at any port or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to that insurance." Secondly; "it was mutually agreed by the parties that no part of the premium should be returned, or abated, on account of any deviation which shall be made by the owner, or their factors, from the present voyage."

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The sole question then is, was, or was not, the going into *St. Thomas's* a deviation?

If the case stated in the bill be made out, there is no ground to call it a deviation; the first recited clause in the policy expressly providing, that if thereunto obliged by stress of weather, or other unavoidable accident, she might lawfully go into *St. Thomas's* (or twenty other different places, under the like circumstances) to avoid the danger. (a) The case is expressly within the terms of the policy.

(a) See Marshall on Insurance, 409.  
Park on Insurance, 308.

But what is the proof of this danger, and necessity? Not the complainant's bill surely! So much of it as relates to this necessity is expressly denied by the answer. There remains then no shadow of proof of such necessity but a paper purporting to be the copy of the Captain's protest, made in *NORFOLK* (not *St. Thomas's*, nor corroborated by the oaths of his mate and seamen, as is usual when a vessel is forced out of her course into a different port) on the 5th day of *February*, 1800, near six weeks after his arrival in *Norfolk*. Whatever may be the effect of a protest taken in a foreign country, to which not only the master but the mate and mariners of the vessel may make oath immediately after their arrival in a port into which they have been driven by stress of weather, or by an enemy, according to the ordinary usage in such cases, (on which I mean not to give any opinion,) such a protest as this, taken at so remote a period of time, and in a different port and country from that where the vessel first arrived, after the insurance upon her could operate, appears to me to be entitled to no more respect as evidence, in a case of this nature, than any other voluntary affidavit, made by a person respecting any controversy which

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had happened, or might happen, between any persons whatsoever. Therefore, without relying on the decision in the case of *Senat v. Porter*, 7 T. Rep. 158. I am decidedly of opinion that *this* protest is no evidence at all in the present case. The consequence is, that the complainant has failed to prove his case to have been such as to entitle him to the benefit of that clause of the policy which would have justified his sailing *into*, and staying *at*, *St. Thomas's*, if the facts stated in his bill had been supported by proper testimony. The case, therefore, falls under the last clause of the policy before recited, by which it was agreed that no part of the premium should be returned or abated on account of any deviation which should be made by the owners, or their factors, from the intended voyage; unless the description of the intended voyage contained in these words of the policy, viz. "at and from *Norfolk to Curraçoa*, with liberty of going to *any other* island in the *West Indies*, or any one port on the *Spanish Main*, and at and from THENCE back to *Richmond*," will apply to the voyage which has been performed.

Mr. *Wickham*, for the appellant, contended that the true intent and meaning of the policy was, that the schooner might lawfully go to *any two* ports in the *West Indies*, of which *Curraçoa* must be *one*; but that she was not bound to go FIRST to CURRAÇOA, but might go first to any other port in the course of the voyage to *Curraçoa*, and then proceed to *Curraçoa*, from whence she was in that case to return back to *Richmond*. But the words of the policy do not admit of that construction; for the word THENCE refers to the last-mentioned description contained in the policy, viz. *any other* island in the *West Indies*, or any one port on the *Spanish Main*, and at and from THENCE (*i. e.* such last-mentioned island or port on the *Spanish Main*) BACK to *Richmond*. The sense is so clear that I am somewhat surprised that so much stress was laid upon that point. The *Sophia* did not then proceed upon the voyage described in the policy. This was a deviation; by which

is meant a *voluntary* departure, without any necessity, from the usual course of the voyage insured.(a) From the moment this happens the voyage is changed, the contract (of risk) is determined; the insurer being discharged from all subsequent responsibility; yet he is entitled to retain the whole PREMIUM; for the effect of a deviation is not to vitiate or avoid the policy, but to determine the risk from the time of the deviation. The proper course of the voyage being once interrupted cannot be resumed in the eyes of the law. The shortness of the time, or of the distance, of a deviation makes no difference as to its effect on the contract. Whether it be for one hour, or a month; or for one mile, or one hundred, the consequence is the same.(b) The true reason (as it is said) why a deviation discharges the insurance, is not the increase of the risk, but, that the party contracting has voluntarily substituted another voyage for that which was insured.(c) So, here, the *Sophia*, by returning back from *St. Thomas's* (supposing her going into that port was matter of necessity to avoid capture, and therefore justifiable) to *Virginia*, instead of proceeding to *Curraçoa*, substituted another voyage from that which was insured, which vitiated the policy from that time. So that the underwriters were not only discharged from all future liability, or risk upon the policy, but, also, from the condition of an abatement, or return of premium on any account whatsoever.

But this is not the *only* deviation that the *Sophia* made from the intended voyage, if the charges in the bill be evidence against the complainant, or the captain's affidavit, or protest, as it is called, be admissible evidence in this cause. The voyage intended and insured against was from *Norfolk* to *Curraçoa*, &c. and back to *RICHMOND*. But, instead of returning back to *Richmond*, the *Sophia* took in a freight at *St. Thomas's* for *NORFOLK*, and there discharged her cargo. It does not appear she ever did return to *Richmond*: if she did, the taking in a freight, and going into *Norfolk* to discharge it, was such a deviation, as, from that

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(a) *Marshall*  
on Insurance,  
392. *Park*,  
294.

(b) *Marshall*,  
*ibid.* 392, 393,  
394. *Park*,  
*ibid.* 294, 298.

(c) *Marshall*,  
*ibid.* 394, 401,  
*Park*, 294.



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time, (if nothing which happened before had done so.) discharged the policy, by substituting an entirely different *return voyage* from that insured. The cases of *Fox v. Black*, *Townson v. Guyon*, and *Elliott v. Wilson*, cited *Marshall*, *ibid.* 394. and *Park*, *ibid.* 295.; and that of *Beatson v. Hawthorth*, cited *ibid.* 396. and 298. and reported in 6 *T. R.* 531.; with the case of *Clason v. Simmonds*, there cited by Judge LAWRENCE, all going to the same point, are conclusive in my opinion to shew that the taking in a freight for *Norfolk*, instead of *Richmond*, was the substitution of a *different voyage* from that insured against, and a voluntary abandonment of the terms and condition of the policy. I am therefore of opinion, that Mr. *Stras* was not entitled to any return of premium; but that his bill ought to have been dismissed: consequently, that the decree be reversed, and the bill now dismissed.

Judge FLEMING. It is a sound general principle that whoever comes into a Court of Equity to ask relief against any part of his contract, ought to shew by the clearest evidence that he has done every thing on his part to entitle him to such relief.

There can be no doubt but the *Sophia's* having put into the port of *St. Thomas's*, before she arrived at *Curraçoa*, the first destined port of her voyage, was a deviation from her course; which would have been justified, had there been legal evidence that it was to avoid capture by an enemy, as alleged by the appellee; but, there being no such evidence, or of any other justifiable cause, proved, or even alleged, the deviation must have the same effect upon the insurance as if she voluntarily had gone a hundred leagues out of her direct or usual course. The consequences of such deviation, and the authorities on which they are founded, have been so fully stated by Judge TUCKER, that I shall only add my concurrence in the opinion that the decree be reversed, and the bill dismissed with costs.

Yancey against Hopkins.

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**LUND HOPKINS** of the County of *Powhatan*, on the first of *March*, 1799, filed his bill in the late High Court of Chancery, against *Robert Yancey* and *Richard Faris*; setting forth that "*Joseph Hopkins*, father of the plaintiff, was in his life-time seised in fee of a tract of land in the County of *Louisa*, containing by estimation 400 acres, and, being so seised, departed this life in the year 1780, having first made his last will, by virtue of which the plaintiff became entitled in fee to the whole of the said land, after deducting his mother's dower; that, while the plaintiff was an infant, (but in what year he could not ascertain,) the defendant *Robert Yancey*, a Deputy Sheriff of the County of *Louisa*, pretending that taxes were due on the plaintiff's part of the said land, affected to expose the same to public auction, to raise the amount of those taxes; that *no such taxes were due*; or, if any, not more than 3*l.* or 4*l.*; that *no notice* was given of the time and place of sale; or, if any was given, it did not describe to whom the land belonged; that no persons were present, except *Robert Yancey* himself, and two other persons, (neither of whom bade,) when the plaintiff's part aforesaid, being worth from four to six dollars per acre, was struck out, by the said *Yancey's* direction, to himself, at the price of 4*l.* or some other equally trifling; that he not only acted fraudulently, but never was authorized in his conduct by the High Sheriff whose Deputy he was; that, combining with the defendant *Faris*, he had pretended to sell the said land to the said *Faris*; that both of them knew that the plaintiff was an infant at the time of the sale by auction, and did not exceed twenty-six years of age on the 23d day of *November*,

ing bought by the Deputy Sheriff, who sold it; conveyed to him by the High Sheriff in February, 1795; and afterwards sold by the Deputy Sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age.

1. If land be listed by the Commissioner of the revenue to a wrong person, sold by the Sheriff as the property of such person, and conveyed by deed to the purchaser; it seems that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may be cancelled, and a release, or recovery, of the land decreed.

2. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance.

3. The land of an infant being, by mistake, listed by the Commissioner of revenue as the property of another person, and sold, as such, for taxes, in December, 1786; be-

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1798; that the plaintiff, in the year 1785, had removed from *Louisa* to the City of *Richmond*; that no application was ever made to his guardian, *Anthony Hayden*, for any taxes due from him; that he had never returned to live in *Louisa*; that *Faris* was well acquainted with all the circumstances of the said sale at auction; he living, at the time, on that part allotted to the plaintiff's mother for dower; that there was sufficient personal property on the said land to satisfy any taxes due thereon; that the said *Faris* had paid little or no money for the purchase made by him of the said *Yancey*; and that they both had derived considerable profits, having been in possession of the land ever since the auction aforesaid."

The bill therefore prayed "a *perfect* answer, from both the defendants, as to the premises; that all official or other writings, whether deeds or obligations, which had passed between them concerning the said land should be directed to be *cancelled*; that they should be decreed to surrender to the plaintiff possession of the land, and *account* with him for all rents and profits arising therefrom; or that he might receive any other or further relief more agreeable to equity."

The separate answer of *Robert Yancey* admitted "that he sold a part of the tract of land mentioned in the bill for the taxes due thereon for the years 1784 and 1785; but averred that he was fully authorized so to do both by law, and by his principal the High Sheriff; that he this defendant had paid the taxes of said land into the treasury, or that there was a judgment against his principal, he does not now recollect which, but inclines to believe the latter; that there was no property that this defendant knew of on said land, of the estate of *Hopkins*, whereof the taxes could be made; and, as the law then stood, there was no other alternative but to sell a part of the land for the taxes due; that the quantity of non-resident lands in the County of *Louisa* is very considerable; that, at the rate of taxation on lands at that time, the amount thereof, being unpaid, would have completely ruined this defendant, who was then just beginning to act for him-

self; that the land was sold in the name of ELIZABETH HOPKINS; that, in that name, it was charged by the Commissioners of the land tax, who by law make out the book for the Sheriff; that there was no land charged to JOSEPH HOPKINS, or LUND HOPKINS; that, by the will of *Joseph Hopkins*, then deceased, this land was left to his wife *Elizabeth Hopkins*,\* who, at the time the assessment was made, occupied and possessed the same; consequently, the land was charged in the proper person's name; at all events, the land owed taxes to the Commonwealth, and it was the duty of the owner to come to the Sheriff and pay it."

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This defendant further said, that "the land was advertised four weeks in the *Virginia Gazette*, according to law; nay, that it had been twice advertised; that, on the last day, no person coming to pay the taxes, and this defendant knowing not to whom to apply, the said *Elizabeth Hopkins* having intermarried, and gone off, God knows where, the land was exposed to sale, and sold on one month's credit at the most noted place on the premises; that there were several persons present, either of whom this defendant believes could have purchased if they chose; that he did not wish to buy himself, and requested the bystanders to bid; none of whom making a bid, it was, after crying a considerable time, knocked out on this defendant at his bid; that he then gave notice that he would give up his purchase, if the executor of *Hopkins*, one *Anthony Hayden*, would come and pay up the taxes and expenses of selling the land in a short time; that he believes that said *Hayden* was advised thereof, for that he made application some time after (this defendant thinks about six or eight months) to know if the land would then be given up if the taxes were paid; that this defendant then offered to give up the same if he, *Hayden*, would repay him what he had advanced, and his expenses, &c.; that *Hayden* said he had no estate of *Hopkins* in his hands, but would try to settle it speedily; but so it is that this defendant has not

\*Note. This allegation in the answer was plainly incorrect; the land being devised in the will to *Lund Hopkins* only.

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received one single penny, nor has said *Hayden* communicated with him about the land since; nor has any other person:" that, after waiting several years, "and having the annual taxes to pay thereon, this defendant had a deed made to him by the High Sheriff therefor, and, to indemnify himself for the original purchase, and the taxes which he had paid for about fourteen years, sold the same to the other defendant."

This defendant insisted "that the lands of *infants* were not exempt from the payment of those taxes more than any other person; *there being no provision in their favour in the law as it then stood;*" that from an acknowledgment in the bill it appeared "that the complainant had been of age more than six years in November, 1798; *which is double the time the law, as it now stands, allows infants to pay the arrears of taxes;* yet, during all this time, the complainant had not applied to this defendant to repay him the taxes which he had paid on said land: if an application of this nature had been made even three years ago, this defendant is confident that he would have given up the land upon the payment of the taxes, &c.; that this defendant did not have a deed executed until the year 1795; one reason for which was, that he did not wish to hold the land; but, in all this time, no person coming to repay him what he had actually advanced, he then determined to have a deed therefor." He farther denied having received any profit or emolument whatever from the said land, except the money arising from the sale thereof; averring that he always considered the land as poor, and of little value, and the rent no object; "the plantation which was on it being old field, and no improvements to accommodate a family."

The defendant *Richard Faris* in his answer averred "that he conceived himself a fair and *bona fide* purchaser;" that he was present at the sale by auction, relative to which, and to *Yancey's* declaration that he would give up the land, on receiving the taxes, &c. he mentioned the circumstances nearly according to *Yancey's* own statement; "that there was no property of the complainant, or of the estate of *Jo-*

*Joseph Hopkins, deceased*, on said land, at the time of the sale, nor for some considerable time before, whereof the taxes could be made; that *Anthony Hayden* lived out of the County of *Louisa*; that this defendant is well assured that the said *Hayden* knew of the taxes being due; that the land had not been occupied by any person since the sale, until the last year; except a part which *Anthony Hayden* rented out, and for which payment was made to him, and the complainant; that, after the death of *Joseph Hopkins, Elizabeth Hopkins*, widow of said *Joseph*, resided and lived on the said land, and held the whole tract as her own until she intermarried with one *Samuel Baber*; after which she took her third part of said land."

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A number of depositions were taken and filed, from which, taken together, it appeared that *Yancey's* account was in substance correct, of the manner in which the sale by auction was conducted; of the declaration made by him at the time, and of the subsequent transactions; that, at the time, and before the sale took place, the said *Yancey* inquired of the persons present what part of the land would be least injurious to the tract, to be sold off for the taxes thereof; that the east end was generally agreed to be that part, and, accordingly, the part sold was laid off on the east end; that the land in question (together with many other tracts) was first advertised to be sold at *Louisa* Court-house on a Court day; but none were sold; it being doubtful whether a sale at the Court-house would be legal; that *Charles Yancey, sen.* one of the Deputy Sheriffs consulted *Edmund Randolph*, then Attorney-General; and, upon his advice, the sales were appointed to be upon the respective premises, and accordingly advertised as long as the law directed in *Thomas Nicholson's* paper, printed in the City of *Richmond*, specifying the day of sale of each tract; (which, as to the tract in question was the 19th of December, 1786;) that the same advertisement was set up at the Court-house, at *Trinity Church*, in the said County, and at other public places; (but it did not appear in evidence that it was set up at the Church

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of *Fredericksville* Parish, in which the land in controversy in this suit lay; which Church was in the County of *Albemarle*, but was nearest to the said land, and was the one that the *Episcopalians* resorted to from the neighbourhood thereof;) that there was no personal property on the land belonging to the estate of *Joseph Hopkins*, but there was property of *Richard Faris*, the defendant, who then lived on that part of the land which was allotted to the widow as her dower, having (before the sale for taxes) purchased her dower-land of *Samuel Baber* or *Beaver*, her second husband, after residing for some time thereon as a tenant; that, about the time the said *Faris* bought the land in dispute, he was heard to say "he expected to be sued for said land, but that he bought it to spite the rascal," alluding to *Lund Hopkins*, as a witness supposed.

It was also proved by Captain *William Hughes*, that, about the time of the sale, by auction, the price of *unimproved* lands was exceedingly low, and that sales were difficult to be made; that lands of a middling or lower class would scarcely sell at any price; that the land in dispute was poor, and situated in the upper end of the County, where lands were more unsaleable than lands nearer the centre; but, on the other hand, it was proved by *Paul Jones*, (third husband of the widow *Hopkins*,) that there is a considerable proportion of uncleared land on the tract in dispute; three-fourths, if not more, of which is *prime tobacco land*; and that there is a considerable proportion of the uncleared as well as the cleared land very valuable for meadow; that, in his opinion, the whole of the land in controversy is worth *five dollars at least per acre*; and that he knows of land adjoining thereto, and by no means superior in quality, that is now held up at forty shillings per acre." It appeared moreover from the deposition of *Charles Yancey, jun.* that the sales for taxes were generally favourable to the purchasers, owing to the scarcity of money; and the people, not having been accustomed to such sales, seemed to want confidence in them. It was

also proved that *Anthony Hayden*, the executor, lived in *Campbell County* at the time of the sale; and that the plaintiff, *Lund Hopkins*, was then an *infant*.

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Among the *exhibits* in the cause were, 1. The will of *Joseph Hopkins*; 2. The deed from *Waddy Thomson*, late Sheriff of *Louisa*, to the defendant, *Robert Yancey*, for the land in controversy, dated the 19th of *February*, 1795; 3. A writing dated *September* 10, 1785, signed (but not sealed) by *Samuel Beaver*, obliging him, his heirs, &c. to make a good right, for his wife's life, to *Richard Faris*, to 133 1-3 acres of land; being the place "where" the said *Faris* rented of *Samuel Beaver*, and likewise the place whereon the said *Beaver* lives:" 4. A certificate of the Clerk of *Louisa*, proving that on the 9th of *September*, 1782, the Court appointed Commissioners to lay off and allot to *Elizabeth Beaver* her dower in the estate of her late husband *Joseph Hopkins*; and that, on the 10th of *April*, 1799, their report was returned and ordered to be recorded; and, 5. A certificate of the auditor of public accounts, that the Sheriff of *Louisa* was debited with the revenue and certificate taxes for the years 1784, and 1785, on a tract of land in said County containing 400 acres, in the name of *Elizabeth Hopkins*, and that judgment was rendered on behalf of the Commonwealth against the said Sheriff for the certificate tax of 1784.

*September*, 27, 1804, the Court of Chancery "being of opinion that the sale of the land which the plaintiff claimeth, by the defendant *Robert Yancey*, was a *fraud*, adjudged and decreed that the indenture among the exhibits between *Waddy Thomson*, of the one part, and the defendant *Robert Yancey*, of the other part, be cancelled, and that the other defendant, who was privy to the fraud, and a *particeps criminis*, release to the plaintiff all his, that defendant's, right and title in and to the land aforesaid; and that the defendants resign to the plaintiff the possession of the said land, and pay to him the profits thereof, since the sale thereof, after deducting the *taxes then due* for the same to the pub-



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lic; of which profits one of the Commissioners is directed to examine, state, settle, and to the Court report an account; and the Court ordereth that a copy of this decree be recorded in the County Court of *Louisa*."

From which decree the defendants prayed an appeal, which was allowed them.

*Nicholas and Botts*, for the appellants.

*Peyton Randolph and Hay*, for the appellee.

On the *merits* of this case, all the points in controversy are so fully discussed in the ensuing opinions of the Judges, that a due regard to brevity compels the reporter not to insert the arguments of counsel.

As to the *jurisdiction* of the Court, it was contended for the appellants, that the plaintiff had a plain remedy *at law* by ejectment for the *land*, and trespass for the *mesne profits*; there being no proof of *fraud*; and the only ground of the relief sought being, that the sale was *illegal*.

But, on the other side, it was said, 1. That the *mistake* committed by the *Commissioners* in listing the land to *Elizabeth Hopkins*, the widow, when, in fact, it was the property of *Lund Hopkins*, her son, could be corrected in a Court of *Equity* only; that the Sheriff was bound to sell according to *their lists*; and therefore the conveyance from the High Sheriff to the Deputy was good *at law*, though not *in equity*. At any rate, it was *doubtful* whether the plaintiff could have succeeded in his action of ejectment, in opposition to that conveyance; and that was ground sufficient for a Court of Equity to entertain jurisdiction. (a)

(a) *Weymouth*  
 v. *Hoyer*, 1  
*Ves y*, jun.  
 417.

2. It was insisted, that the deed was *fraudulently* obtained by *Yancey* from the High Sheriff; for, in a *technical* sense, *fraud* may be committed without any *immoral* motive. He might have *thought* that he had complied with the requisites of the law in the sale of the land, and told the High Sheriff

so: but this representation was incorrect, and a deception, even, if not intended as such.

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*Wednesday, November 7.* The Judges pronounced their opinions.

Judge TUCKER. This was a bill brought by *Hopkins* to set aside the sale and conveyance of 200 acres of land, (part of a tract of 400 acres, in *Louisa* County,) sold on the 19th of *December*, 1786, by the Deputy Sheriff of *Louisa* County, for the taxes due thereon for the years 1784 and 1785, and purchased by *Yancey*, the Deputy Sheriff, (by whom the same was distrained and sold,) and afterwards conveyed to him by the High Sheriff; and then sold by the defendant *Yancey* to the defendant *Faris*. The Chancellor set aside the sale, and decreed that the deed should be cancelled.

It was objected by the appellants' counsel that the complainant had a plain remedy at law, by an ejectment, to recover the premises. But I am of opinion that he had a right to come into a Court of Equity for the purpose of setting aside a deed which might have obstructed his recovery in an ejectment. And it was more beneficial to the defendants that he should do so, as they might, by their answer, purge themselves of any imputation of fraud or collusion in making the sale. Besides, the object of the bill was to compel a reconveyance of the land from the defendant *Faris*, which a Court of Law could not enforce. And as a single verdict in ejectment might not have been conclusive, I think the parties pursued the most proper course.

The complainant at the time of this sale was an infant of very tender years, to whom the land was devised in fee-simple by his father, whose will bears date in *June*, 1780, and was proved and admitted to record in *Louisa* County, in *August*, 1782. It does not clearly appear that he had any guardian; none being appointed by the will. *Anthony Hayden* qualified as an executor. He resided in another County. The infant's mother removed from *Louisa*, in

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1785, having married another husband, who before that time (it would seem) sold her dower estate to the defendant *Faris*, who then actually resided upon the land. She did not return till 1795. *Faris* had property upon the land sufficient to have paid the taxes.

The land was charged in the Commissioners' books to *Elizabeth Hopkins*, the complainant's mother, and was sold by the defendant *Yancey*, and purchased by *him*, and conveyed by the High Sheriff to *him*, as the property of the said *Elizabeth Hopkins*, which had been sold for the taxes due thereon.

(a) *Johnston,*  
*Guardian of*  
*Hinton,* v.  
*Thompson,*  
*MS. S. P.*  
*Kinney v. Be-*  
*verley, 2 H.*  
*& M. 318.*

I will here premise (a) that, whenever an authority is given to any person, or officer, by law, whereby the estates or interests of other persons may be forfeited and lost, or otherwise affected, such authority must be strictly pursued in every instance. And any omission, or mistake, in the performance of these duties which the law prescribes, will vitiate the whole proceeding. More especially, where an act is in its nature so highly *penal*, that a man may absolutely lose his whole property, for a few days' neglect in the payment of a tax which has never exceeded one hundredth part of the valuation thereof by sworn Commissioners; and where the law has left the power of enforcing that penalty in the hands of a mere *ministerial* officer, who may, as in the present case, become the purchaser of the lands himself, for the bare amount of the tax due thereon. And, above all, in the case of an *infant*, without any guardian (as far as appears in this case) to protect him, or his property, from utter ruin and destruction.

By the act of *October, 1781, c. 40.* the Commissioners of the taxes are required to take an account in writing of the quantity of land *belonging to all PERSONS WITHIN THEIR COUNTY*, (except their own,) and also the name of the proprietor, or *proprietors* thereof; and ascertain the value thereof. And in all valuations pursuant to that act, the same rules and regulations are to be observed, with respect to and between landlords and tenants, (unless the contract

between them be specially otherwise,) as directed by the act of *October, 1777, c. 2. s. 6.* which provides, that, where the *landlord* shall reside out of the Commonwealth, or have no visible estate whereon to levy the pound rate, for the value of his land, in such case the pound rate shall be paid by, or LEVIED UPON, THE TENANT, not exceeding the annual amount of the rents which shall be allowed him by the landlord. The same act, sect. 8. further provides, that, where any lands shall be assessed in a County, wherein the proprietor doth not reside, nor hath any effects whereon to levy the said pound rate, and the Commissioners shall discover in what other County the proprietor lives, or hath effects, they shall transmit the assessment to such other County, there to be collected, &c.(a)

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(a) See Chan.  
Rev. 60, 61.

Neither the acts of 1781, c. 40. or *October, 1782, c. 8.* contain any specific provision on the subject of the tax on lands belonging to proprietors not residing in the County, as far as I can discover; so that the case of such proprietors is either wholly omitted, or falls under the provisions of the act of 1777, c. 2. s. 6. and 8. But, by the act for equalizing the land-tax, passed in *October, 1782, c. 19.* the duty of the Commissioners of the taxes is enlarged. By that act they are to make diligent inquiry of all lands within their County which had not been theretofore valued; and also of all alienations or partitions which may be made: and, for that purpose, they are to be furnished yearly by the Clerk of the General Court, and of the County, with lists of all conveyances or partitions within the preceding year in the respective Courts admitted to record; and if the purchaser or seller shall not, before a certain day, have satisfied the Commissioners as to the just value of the land, the same shall be charged as land of the best quality in the County.

From the exhibits it appears that *Joseph Hopkins's* will, wherein he devised these 400 acres of land to his son *Lund Hopkins*, the complainant, was proved in *Louisa* Court, two or three months only before the passage of this last act; that *Beaver*, who married *Hopkins's* widow, sold his wife's right

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therein, viz. 133 1-3 acres, to the defendant *Faris*, the 10th of *September*, 1785; and, by the several answers and other evidence in the record, that the *whole tract* was charged by the Commissioners of the land tax to *Elizabeth Hopkins*, and not to *Lund Hopkins*, to whom it was devised; that she had removed away in 1785, and, probably, (though that does not appear,) carried her children with her.

By the act of 1784, c. 91. one half the taxes for the year 1783, were remitted: and, for the other half, it permitted a distress to be made on the first of *September*, 1785. But the act of 1785, c. 38. postponed the time of making distress for the same until the first of *March*, 1786: so that *Faris* was in actual possession, either as a tenant, or as a purchaser, long before that period.

From this view of the case, it appears to me that the Commissioners of the tax either mistook or neglected their duty, by charging the *whole land* to *Elizabeth Hopkins*, to whom it was not devised, even during her widowhood, as I apprehend. The Sheriff also mistook his duty, I think, in selling the land itself, instead of distraining the property of *Faris*, who lived upon and claimed a title to a part, as a purchaser from *Beaver*, the husband of *Joseph Hopkins's* widow. Or, if the act of 1777, c. 2. before referred to, may be considered as in force so far as relates to the lands of proprietors not residing within the County, if the Commissioners had discovered where the proprietor of the land resided, they ought to have transmitted the assessment to the County where he resided, or *had effects*. But I am not altogether satisfied that this act was not repealed by the act of *October*, 1782, c. 8.; and, if so, it would seem that the case of non-residents' lands was omitted in that act, as well as that of 1781, c. 40. So that, whichever way the subject be taken, there has been a fatal mistake, either on the part of the Commissioners, or of the Sheriff, and consequently I conceive the sale to be absolutely void, as against the true proprietor of the land, who was the complainant, *Lund Hopkins*.

And here I will add that I proceed entirely on the ground of *mistake* in the officers of the Commonwealth, and *not of fraud* in the defendant *Yancey*, by whom the sale was made. I have not considered the case as to *Faris*, further than to say that he must be considered as a purchaser with full notice. For, knowing the land to have been sold, under colour of an authority given by law to a public officer, who was not the proprietor thereof, he was bound to inquire, and to take notice, whether that officer, and all others whose agency was required by law, had proceeded with due regularity in discharge of their duty.

On these grounds, and *not on the ground of fraud*, I am of opinion that the Chancellor's decree be affirmed. (a)

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Judge ROANE. Seldom has a case occurred in which my opinion differed more diametrically from that of the Court below, than in the one before us. Instead of having committed an odious *fraud* meriting the unusual reprobation of directing the decree, rendered in this cause, to be recorded in the Court of the County in which the transaction happened, the testimony has entirely convinced me that the appellant *Yancey* acted with all imaginable fairness touching the sale in question. There is not an *iota* of testimony tending to produce any other impression upon my mind.

The taxes due on the land in question were debited to the Sheriff as due from *Elizabeth Hopkins*, (see the certificate of the auditor,) and it was not for that officer to consider them as due from any other; or, in other words, to depart from the Commissioners' books in this respect, and take upon himself the responsibility of settling the rights of property, and scrutinizing into titles: that the Sheriff was to govern himself, in this particular, solely by the Commissioners' books, who and who only were to make the necessary alterations therein resulting from conveyances, &c. is evident not only from the act of 1782, equalizing the land-tax, (which provision is also kept up to the present day,)

(a) See the act of 1787, c. 42. to remedy abuses in sales of lands for taxes.

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but is moreover supported by the opinion of Judge TUCKER in *Kinney v. Beverley*, (2 H. & M. 330.) who says in emphatical terms, that those books are to be "the *guide of the Sheriff* in collecting the taxes." There was no personal property upon the land belonging to the person to whom the tax was charged, whereof it could be made; and the Sheriff was consequently bound to sell the land itself. Nothing is more clear than that, according to the true construction of the acts by which this case is to be governed, *such* personal property only was liable to be taken, and not the property of *other* persons which might chance to be found upon the premises: and it was not until the act of 1790, c. 5. that a hint was given in our laws that the property of the *tenant* might be liable. The testimony in this case shews us, that this sale was duly advertised in the *Gazette*, and the deposition of *Charles Yancey, sen.* aided by other testimony, in the cause, entirely satisfies me that it was also duly advertised at the Court-house, and other public places in the County. Considering the great lapse of time which has occurred, and the fleeting nature of such circumstances, it is unreasonable to expect more satisfactory proof on this last point, than is furnished in the case before us. The sale was fairly and openly made at the most noted place upon the premises on a credit of one month; the bystanders were repeatedly invited to bid; their opinion was asked and followed as to the manner of laying off the land sold: it was not till after a failure to bid by other persons that the Sheriff himself made the bid which finally secured to him the land; and public notice was given at the sale, and afterwards repeatedly renewed, in particular, to the guardian of the appellee, that the land purchased might be redeemed in a reasonable time for his benefit. Yet a great length of time, amounting to many years, was suffered to elapse before any effort whatever was made to this effect; prior to which the land was sold to the other appellant.

With respect to the infancy of the appellee, although the

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act of 1790, c. 5. has allowed three years for an infant to save his land, after his infancy has expired, I do not find that any provision was made in favour of *infants* by the acts of the period at which this transaction took place. *They* are therefore to be bound by the general words of the act, as well as adults. On this principle, I recollect it to have been somewhere decided that infants would have been bound by the general provision in the act of limitations, but for the special exception therein inserted in their favour.

Objections, however, are made in this case, 1st. To the legality of the purchase by the *Sheriff* himself; and, 2dly. To the lowness of the price given for the land, whence, I presume, it was inferred, or supposed, that the transaction was fraudulent.

As to the first objection, it may be remarked that, while the law was imperious upon the *Sheriff*, under a heavy penalty, to finish his collection by a short and given day, without any other allowance than for *insolvents*, which certainly do not include persons having land liable for taxes; while it is a maxim of justice and sound sense, that, when the law requires a thing to be done, it also gives the necessary means of doing it; and, while there was no *express* inhibition at that day, in any statute, against the *Sheriff's* bidding for his own private emolument, such inhibition is not, on the other hand, to be inferred from the reason of the principle on which, in *other* cases, it has been held that certain descriptions of persons are disabled to purchase property offered for sale by themselves. The inhibition in those cases seems to arise from the confidence placed in, and the intimate knowledge acquired by, trustees, commissioners of bankruptcy, auctioneers, &c. which would enable them, if permitted to purchase, to avail themselves of facts coming to their knowledge in their several characters, and, by withholding them from others, to lessen the prices of the articles exposed to sale, to their own emolument. (a) But, in the case in question, no confidence has been reposed in the *Sheriff*, and no *facts* have come to

(a) *Sugden's Law of Vendors*, 391—405.



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his knowledge, which he might abuse to his own advantage: he has no other information on the subject than is derived from the books of the Commissioners as aforesaid: it would be too much to suppose him conscious of the particular circumstances attending all the tracts of land in his County. This case then does not seem to fall within the reason of the principle before mentioned; and it is not shewn by any adjudged case that the inhibition has in *England* been extended to Sheriffs, or Collectors, though, I presume, the case must have occurred in a thousand instances. It is true, indeed, that the act of 1787, c. 42. premising that abuses had taken place in this particular, declared that a purchase of lands sold for taxes by a Sheriff or Deputy Sheriff, and bought by himself, should thereafter be considered as held in trust for the payment of the taxes, and might be redeemed by the proprietor: but on this act it is to be remarked that it not only does not apply to this case, being posterior to it, but, on the other hand, admits and recognises the frequency of the practice of bidding by Sheriffs in such cases, or, in other words, the custom of the country in that particular; and, on this ground, brings this case within the reason of the decision of this Court in respect of executors, in the case of *Anderson v. Fox*, 2 H. & M. 245. In that case it was held, or seems to have been held, on this last ground only, *i. e.* the practice of the country, and the consequences resulting from departing suddenly from it, that a purchase by an executor from himself, if fair in all respects, should be supported. (See Judge TUCKER's opinion, p. 263.) If such considerations were considered to have this effect in a case coming directly within the principle aforesaid, (for an executor is emphatically possessed as well of the secrets, as of the confidence of the testator respecting his property,) much more so will they have that effect in cases in which such knowledge and confidence is wholly wanting: if they had this effect, in cases in which the purchase by the executor was entirely *voluntary*, much more so would they have

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that effect where the provisions of the laws on this subject would, as it were, inflict a penalty upon the Sheriff for not bidding, and where his bidding might be absolutely necessary to counteract combinations to defeat the collection of the revenue, whether arising from the sympathy of the bystanders, or other causes. As to the general custom on this point, it does not rest only on the recognition of the act of 1787, and various other acts of Assembly, but is admitted, in this case, by the deposition of *Charles Yancey*, sen. who also *instructed* the deputies acting under him to purchase, in case no other person would do so.

With respect to the *price* at which this land was sold, it is true it was remarkably low; but it is also proved that the land was of very indifferent quality; that lands of *that description* would scarcely sell at any price; and that there were a great many tracts offered for sale in *Louisa*, at the same time, and for the same purpose: indeed, according to the deposition of Captain *Hughes*, who on one occasion acted as *cryer* of these lands, it may be said that this tract, *comparatively*, sold *well*; for he tells us that *many whole tracts* of land were sold to pay the taxes, whereas only *half* of the tract in question was found necessary; whence it would seem that this land sold for 100 *per cent.* more than some other tracts in the same County.

On these grounds, and because the appellant *Yancey* was compelled by the *laches* of the appellee's guardian to hold the land, (which is also proved to have been very unproductive,) and pay taxes thereon, for a term vastly longer than that *subsequently* allowed, by law, to *infants* to come forward and redeem their lands, I am of opinion that the bill of the appellee ought to have been dismissed. While it is very probable that many abuses may have occurred in cases like the present, the testimony in this cause (while it is not seen that the purchase was at that time interdicted by the provisions of any *statute*, or any equivalent *principle*, and was sanctioned on the other hand by the *practice* of the

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country) convinces me that the appellant *Yancey* acted in the case in question with all imaginable fairness.

My opinion is to reverse the decree, and dismiss the bill.

Judge FLEMING. It has been well observed by Judge TUCKER that, whenever an authority is given to any officer, or other person, by law, whereby the estates or interests of other persons may be forfeited, or lost, such authority must be strictly pursued in every instance: and, I will add, that penal laws of every description are to be strictly construed; and nothing therein taken by implication, or intendment; and, more especially, where the estates or interests of *infants* may be affected: and the laws subjecting lands to be sold for the payment of taxes I consider as highly *penal*. By the act of *October, 1781, c. 40.* the Commissioners of the taxes are required to take an account in writing of the quantity of land belonging to all persons within their County, (except their own,) and also the name of the proprietor or proprietors thereof. Here, then, at the very threshold of the business, the direction of the law was departed from, by the Commissioners' mistaking the proprietor, and entering the whole 400 acres devised to *Lund Hopkins*, by his father *Joseph Hopkins*, as the land of *Elizabeth Hopkins*, when she had only a life-estate in one third part, as her dower therein. The Sheriff's books for the collection of the taxes were, no doubt, made out from those of the Commissioners; and thus the mistake was continued till the 19th of *December, 1786*, when the land belonging to *Lund Hopkins*, an infant of tender years, was sold, as the land of *Elizabeth Hopkins*, for less, perhaps, than a fortieth part of its real value; at a time, too, when it is in evidence that, at the day of the sale, there was property on the premises sufficient to have paid the taxes due, belonging to *Richard Faris*, who then lived thereon, as purchaser of the dower of *Joseph Hopkins's* widow, who, at that time, was married to *Samuel Baber*, or *Beaver*, and

*Faris* afterwards became a purchaser of the land in controversy, with full knowledge of the preceding circumstances; having declared in the presence of *Martha Anderson*, (about the time he made the purchase,) that he expected to be sued for the said land, but that he bought it "to spite the rascal," alluding to *Lund Hopkins*, as the witness supposed.

For these reasons, I think the decree is a just one; though not on the ground of any *fraud* practised by the Sheriff: and it is an invariable rule with me never to reverse a judgment, or decree, without a thorough conviction that it is erroneous.

By the majority of the Court the decree was AFFIRMED.

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Mason's Devises against Peter's Administrators.

Monday,  
October 22.

UPON an appeal from a decree of the Superior Court of Chancery for the *Williamsburg* District.

The suit was originally brought in the late High Court of Chancery, by *David Ross & Co.* and *Walter Peter*, against the executors and devisees of *James Mason*, deceased, and, having abated by the death of *Walter Peter*, was revived on behalf of *James Freeland* and *Robert Kennan*, his administrators. Its object was to obtain satisfaction, of certain simple contract claims upon the estate of the said *James Mason*, out of lands devised to his sons; the bill suggesting that the executors refused to pay them on the pretence "that there had not come to their hands sufficient of the personal estate of their testator, for the payment of his whole debts, and that they must first discharge the specialties, and such claims as are considered entitled to a preference in the distribution of the assets." The plaintiffs contended, that the devisees having had the benefit of the *personal* estate applied

1. A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshalling assets, against the devisees of the landed property, until he has fully prosecuted his claim at law, against the executor and his securities.

2. A judgment by default, against an executor, is *prima facie* admission of assets.

3. A judgment against the executor is no evidence against the heirs or devisees of the real estate.

4. A decree against devisees holding by several and distinct devises, ought not to be joint, but *pro rata*.

5. *Quere*, whether, and under what circumstances, a Court of Equity can decree a sale of land descended or devised, (without any specific lien, or any charge, either general or special, by a conveyance or will of the ancestor or devisor,) to satisfy a bond, or a simple contract creditor, claiming on the principle of marshalling assets? Especially, can such decree be made, in any such case, where the rents and profits of the land are sufficient to keep down the interest accruing on the debt?

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for their ease, in discharge of debts which would otherwise have been a lien on the *real estate*, and the same (the *personal estate*) being of sufficient value and amount to discharge and satisfy all the debts due by *simple contract*, the creditors by simple contract were entitled in equity to compensation for the same, and that so much of the *real estate* ought to be *sold*, as shall be sufficient to replace the *personal estate* applied or used in payment of debts, due by *bond*, and other specialties of equal or higher dignity."

No copy of the will of *James Mason* was inserted in the record: but, from the bill and answers, the devisees appear to have been entitled to *separate* tracts of land by *several and distinct* devises. The claim of *David Ross & Co.* rested on an open account, against which the act of limitations was pleaded. That of *Walter Peter* was also by open account originally; but a judgment *by default* had been obtained upon it against the *executors* in the County Court of *Greenville*, in *November, 1786*; on which judgment no execution had been issued.

*William Mason* (who seems to have been the only acting executor) having died, the surviving executors, and the devisees, in their respective answers, denied any *knowledge* of the claim of the said *Walter Peter*, and generally averred that the judgment was obtained in their absence; "but they were *informed and had reason to believe the same was unjust.*"

The late Chancellor referred the accounts between the plaintiffs and *James Mason*, deceased, to one of the Commissioners of the Court, directing him "to state and report them, *with the proofs thereof*, and also an account of the administration of the said *James Mason's* goods, chattels and credits, distinguishing particularly the debts which, chargeable on his real estate, were paid out of the *personal estate.*" In compliance with this decretal order, Master Commissioner *Rose* made a report, setting forth the judgment obtained in *Greenville Court* as the only proof of *Walter Peter's* claim, and a statement of the administration account, shewing a balance of 53*l.* 14*s.* 1*d.* in favour of *William Mason*, the acting executor; together with a list of debts stated "to have been paid out of the *personal estate* in satisfaction of debts chargeable on the *real estate*; to the amount of 7,169*l.* 11*s.* 3*d.* except that 1,433*l.* 5*s.* was credited for *real estate sold* by the testator's direction in his will."

Upon this report, the Court of Chancery for the *Williamsburg* District, on the 21st *July*, 1804, dismissed the bill as to the plaintiffs *David Ross & Co* ; and as to the defendants the surviving *executors* ; but decreed, that the defendants, the sons and *devises* of *James Mason*, deceased, out of the lands in the bill mentioned, devised to them by the will of their father, should, on or before the 1st day of *January*, then ensuing, pay to the plaintiffs, administrators of *Walter Peter*, the amount of the judgment obtained by him as aforesaid, with interest and costs ; and, in case of default of such payment, that certain commissioners should expose to *sale*, by auction, for ready money, the lands aforesaid, or so much thereof as would be sufficient to pay the said money, interest and costs, and pay the proceeds of such sale to the said administrators. The plaintiffs *David Ross & Co.*, and the defendants *Edmunds* and *George Masons*, two of the *devises*, prayed an appeal from this decree, which was granted ; but no bond was given by *David Ross & Co.* for prosecuting the appeal.

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*Wickham*, for the appellants, made several objections to the manner in which the cause had been conducted, but relied chiefly on the *merits*, as being decidedly in their favour. The judgment in *Greensville* County Court was no proof of the justice of the plaintiff's claim ; being obtained by *default*, and it not appearing whether any *writ* had been served on the defendants. But, if the *executors* were bound by that judgment, the *heirs* or *devises* were not. They do not claim *through the executor* ; but by rights altogether *collateral*. If the *executors* by their answer in *this suit* had admitted the plaintiffs' claim, the *devises* would not have been bound by such admission. Surely, then, an admission in *another suit* cannot bind them.

A simple contract claim cannot stand on a better footing than a bond : and, if a bond creditor had sued an executor, and obtained judgment, and afterwards had sued the heir at law, would the heir have been bound by the judgment ? Could he not still have pleaded that the bond was not the act and deed of his ancestor ? Suppose even *one* of two *joint* *devises* were sued on the bond, and admitted the claim ; could not the *other* plead in like manner, notwithstanding the greater privity between two such *devises* ?

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Certainly, then, the claim of the plaintiff *Walter Peter*, as against the present appellants, is wholly unsupported.

2. Each devisee should have been charged *pro rata*, instead of jointly; since, in their answers, they say they are *several* devisees.

A Court of Equity derives great part of its jurisdiction from the power of discriminating, so as to do equal justice. In a suit against legatees for contribution, each legatee is charged in proportion to the property received by him. It has been decided in the Federal Court<sup>(a)</sup> that, if one legatee be insolvent, he is nevertheless charged with his share, and the other legatees only *pro rata*; so that the creditor loses the part for which the insolvent legatee is responsible. The whole claim is not to be fixed on the competent legatees. But surely, where there is no pretence of insolvency, one legatee should not be compelled to pay for the rest. Such a decree would drive him to file a bill against the other legatees. But a Court of Equity ought so to decree as to put an end to the controversy, and not to multiply litigation.

3. In this case the Chancellor ought not to have decreed a *sale* of the lands, but only an *extent*, which is all that a *bond* creditor can have at law. Surely, a simple contract creditor coming to marshal assets can only be entitled to stand in the shoes of the bond creditor.

*George K. Taylor*, for the appellees, in answer to the first point, observed that a judgment must be presumed to be fair until the contrary appears; <sup>(b)</sup> in the same manner as an administration account settled by Commissioners is to be considered *prima facie* correct, unless errors or fallacies be pointed out. <sup>(c)</sup> If so much respect be due to an *account*, rendered perhaps by an executor himself, a *judgment* of a Court of Record is not entitled to less. Here, the executors and devisees are jointly sued. The executors do not allege that *no writ* was ever served upon them. If such had been the case, would they not have said so? But, instead of this, they only say they *believe* the judgment was *unjust*, and that it was obtained in their absence! Ought they not to have pointed out *what* injustice or error they complained of, in order that the plaintiff might have had an opportunity of controverting it?

(a) *Main v. Murray*, not reported.

(b) *Lee, Ex'r of Daniel*, v. *Cooke*, 1 Wash. 306.  
(c) *Anderson and Starke v. Fox*, 2 H. & M. 245. *Atwell v. Admr's v. Milton*, 4 H. & M. 253.

2. The Chancellor was not incorrect in making a *joint* decree against the *devisees*: for this plain reason. The will (under the act of Assembly) was a *nullity* against creditors.<sup>(a)</sup> The case in the Federal Court concerning *legatees* was very different from this. *Legatees* are considered as innocent sufferers claiming under legal title: but the claim of *devisees* is *nullified* by the law.

3. As to the power of the Court to decree a *sale* of the lands in a case like this, Mr. Taylor cited *Clifton v. Burt*, 1 P. Wms. 679. note 1. 3 Bl. Comm. 436. 438. as to the general powers of a Court of Equity; *Stileman v. Ashdown*, 2 Atk. 608.<sup>(b)</sup> an example of a sale to satisfy a judgment creditor; *Manaton v. Manaton*, 2 P. Wms. 234, 235. the same measure resorted to in favour of bond creditors, though the lands were *not devised* for payment of debts; and *Powell v. Robins*, 7 Ves. jun. 211. in which case the lands would have been sold at the suit of *simple contract* creditors, if the defendant, the devisee, had not been an *infant*: but liberty was reserved to the plaintiffs to apply for a sale when the infant should come of age. In *Galton v. Hancock*, 2 Atk. 439. an account was directed to be taken of the real assets descended upon the heir, and that the same should be *applied* to pay off and exonerate the mortgage upon the estate devised to the defendant. How, otherwise than by a *sale*, could this be done? In *Donne v. Lewis*, 2 Bro. Ch. Cas. 263. Lord Thurlow lays down the order of applying assets to the payment of debts; according to which opinion, when the personal estate is exempt or exhausted, first, the real estate *expressly devised for the purpose* is to be applied; secondly, (to the extent of the *specialty* debts.) the real estate *descended*; and, thirdly, the real estate *specifically devised subject to a general charge of debts*.<sup>(c)</sup> It follows inevitably, that Lord Thurlow meant that all the several descriptions of property specified by him might be *sold* by the decree of a Court of Equity.

Such are the authorities in *England*: but, in this country, the reasons for a sale are still stronger; because *there* estates generally bring *good rents*; but *here* it is otherwise.

Wickham, in reply, did not conceive it necessary in this case to examine Mr. Taylor's authorities concerning the marshalling of assets, and the power of decreeing a *sale*. But, on principle, he did not see the Court of Equity's right. They have no such

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(a) 1 Rev.  
Code, p. 48. c.  
51. s. 2.

(b) Ambl. 13.  
S. C.

(c) See also  
*Davis v. Topp*,  
cited in the  
note, 2 Bro.  
Ch. Cas. 259.  
and *Wilde v.*  
*Clarke*, cited  
*ibid.* 261.



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right in the *life-time* of the debtor: why, then, should they have it alter his *death*? But, as to the *proof of the claim*;

There never has been an adjudication that the *heir* is bound by the admission or default of the *executor*; neither can a judgment be *presumed* to have been right, except against the *parties*. Yet here there was no admission at all; for no writ appears in the record.

If there was any admission, it was equally an admission of *assets*. The plaintiff, therefore, has no right to come into equity. In every case of a simple contract creditor's applying to marshal assets, it will be found there was no judgment against the *executor*. No instance can be found where *such a creditor* relied on *such a judgment* as evidence against the *heir* or *devisee*. *Lee, Executor of Daniel, v. Cooke*,<sup>(a)</sup> is not like this case: for there a privity existed between the *vendor* and *vendee*. So, in *Anderson and Starke v. Fox*,<sup>(b)</sup> there was privity between the *executor* and *legatee*; but there is no privity between *heir* and *executor*. What this judgment was founded upon does not appear. By what human means can *we* shew it was unrighteously obtained? Our claim is not only *collateral* to that of the *executor*, but *prior* in point of time.

I hardly expected it would be contended that this decree is correct in being *joint*, and not *pro rata*.

The defendants have confessed the real assets devised. In a suit, *at law*, against devisees, the judgment is never peremptory, except for a *false plea*. A Court of Law then does equal and exact justice. Yet Mr. *Taylor* would invert the rule, as to a Court of *Equity*, and drive the devisees to bring another suit against each other for contribution. He says the case of *devisees* is different from that of *legatees*, because, under the act of Assembly, the devise is void. But it is void against *such creditors only* as have a right *at law* to come against the real estate. In this case, *Peter* claims on the ground that his remedy is *merely equitable*, being only a simple contract creditor. If his right was *good at law*, why did he come into *Equity*?

Judge TUCKER having suggested that *Peter* had a complete remedy, *at law*, against the *executor* and his securities; the judgment by default having been an *admission* of assets, Mr. *Taylor* begged leave to make a few additional observations.

(a) 1 Wash.  
304.(b) 2 H&M.  
245.

The failing to proceed to subject the executor at law, is no objection to the present claim in equity; because *it appears that, in fact, the executor had no assets*. The judgment by default was only *prima facie* an admission of assets even at law; for in *Ruffin v. Pendleton*(a) the executor was allowed to plead "*fully administered*" to the action for the *devastavit*.\* A contrary doctrine is held, indeed, in the *English* books: but there they acknowledge the estoppel arising from the executor's failing to plead to be odious even at law, but not applying to bind a Court of Equity. In this country the Chancellors and County Courts universally have given the executor relief, (where he failed to file the plea of fully administered,) upon the terms of his paying the costs.

In the present case, then, as it appears, from the commissioner's report, that *William Mason*, the acting executor, had fully administered; for what purpose should *Walter Peter* have prosecuted him farther? And now, after the lapse of 24 years since the date of his judgment, is it reasonable that a Court of Equity should drive him from its presence to a Court of Law again? Can the plaintiff, at this distance of time, maintain an action of debt upon his judgment?(b) If he can, may not the defendants defeat it by the act of limitations?(c) Would he not, then, by the act of this Court, be completely divested of all right to recover a just debt? and why? because he was not wiser than all the Courts of Equity in this land.

Mr. *Taylor* moreover observed, as to the *proof* in this cause, that a judgment *may* be given in evidence against persons *not parties or privies*; as if the common and ordinary case of one creditor's suing an executor and obtaining judgment: other creditors are bound by such judgment.

As to the power of the Court to decree a *sale* of the land; the Court of Equity is influenced by the circumstances of each case. *Where the rents and profits are sufficient to pay the debt, a sale is not to be decreed*: but *where they are insufficient*, a sale is best for all parties.

*Wickham*. All I contend for is, that, in a naked case, of a judgment by default against an executor, if no equitable excuse

\* Note by the Reporter. See also *ante*, p. 11. *et seq.* the case of *Gordon's Administrators v. The Justices of Frederick*, in which it was decided that an executor shall not be presumed guilty of a *devastavit* till it is found against him by a verdict.

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(a) 2 Wash.  
184.

(b) 2 Rac.  
Abr. 739.  
(Gwill edit.)  
tit. Execution,  
Letter H.  
(c) *Ibid.* 291:  
tit. Debt, Let-  
ter G.

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appears, he is bound. Does this record (admitting the judgment to have been regularly obtained) shew any excuse for the executor's failing to plead at law. On the contrary, it does not appear that he has fully administered according to law; for one of the debits is for a simple contract claim of the executor himself against his testator, amounting to 599*l.* 13*s.* 10*d.*; of which he could not avail himself after suffering judgment by default. The rule is that, of creditors in equal degree, he who sues first is entitled to be paid first; and the only means by which the executor can give a preference is by *confessing* judgment in favour of the creditor who subsequently sues. As the executor could not bring a suit against himself, he had a right to retain in his own favour, in the same manner as the creditor who sues first is entitled to a preference; but, having suffered judgment by *default*, in favour of *Peter*, he loses that advantage.

Mr. *Taylor's* argument, that the judgment is conclusive against *us*, is in conflict with his argument that it is not conclusive against the *executor*. If conclusive as to the amount of the *debt*, it must be conclusive as to the *assets*. The case of *Erving v. Peters*, 3 *Term Rep.* 685., has settled the point that, if an executor plead payment to an action on bond, and omit to plead fully administered, it operates as an admission of assets, in an action, founded on the judgment, suggesting a *devastavit*. Neither is there any hardship in this; since, according to *Chisholm v. Anthony*, 1 *H. & M.* 27. he might have amended his plea on motion, at any time before the trial.

I never have understood the law as settled in this country, that an executor may obtain relief in equity, *in all cases*, where he failed to plead at law. The doctrine that a Court of Equity might give relief in every case where injustice was done, of which it was to be the judge, has been overruled by this Court. And why should that doctrine stand in the case of an *executor only*? It has been decided by the late Chancellor that an executor, if he thinks himself in danger, may apply to the Court by filing a bill of conformity against the creditors; in doing which he assumes the point that, without the *previous* interposition requested of the Court, he would be liable for a *devastavit* by failing to plead at law.

Friday, November 9. The Judges, TUCKER and FLEMING

(Judge ROANE having been absent at the argument of the cause) pronounced their opinions.

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Judge TUCKER. *Walter Peter*, in his life-time, brought a bill against the executors and devisees of *James Mason*, the object of which was to obtain satisfaction for a simple contract debt due to him from *James Mason*, deceased, out of the real estate devised to his several sons, the personal estate being exhausted by the payment of debts of superior dignity. He had before obtained a judgment (by default) against the executors, for his debt, but does not appear to have proceeded even so far as to sue out execution upon that judgment. The record in that case is either very imperfect, or the judgment was obtained without even suing out a writ; and the executors who answered speak of it as having been unjustly obtained, and without their knowledge. There is no other proof of the debt. By the account stated by the Commissioner, there appears to be a balance due to the executor *William Mason*, who alone acted.

The first question that appears to me to arise in this case, is, whether the plaintiff *Peter* had not a plain and adequate remedy at law? He had obtained a judgment, by default, against the executors. Such a judgment amounted to an admission of assets in their hands. He might have sued out execution thereupon immediately; and, upon the return of *nulla bona*, he might have brought an action for a *devastavit* against the executors; and, finally, he had a remedy at law against their securities. After the several decisions of this Court in the cases of *Maupin v. Whiting*, (a) *Pryor v. Adams*, (b) and *Terrel v. Dick*, (c) and those of *Turpin v. Thomas*, (d) and *Morris and Overton v. Ross*, (e) and some others, I cannot conceive that such a bill as the present can be sustained in a Court of Equity. For any thing that appears, or can appear, by this record, Mr. *Peter* had his remedy in his own hands at law; and if, without any good reason, he thought proper to abandon it there, he cannot, under such circumstances, come into a Court of Equity.

(a) 1 Call, 224.  
(b) Ibid. 382.  
(c) Ibid. 546.  
(d) 2 H. & M. 139.  
(e) Ibid. 408.

The second question is, whether, supposing him entitled to come into a Court of Equity, against the devisees, he is, upon the proofs in this record, entitled to a decree against them. And I am clearly of opinion that he is not. There is not a syllable of proof of his claim, in the record, except the judgment, which,

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being against the *executors* only, is no proof against the *devises of land*. For there is no privity between an *executor*, and the *heir*, or *devisee* of the *land*; however it may be (on which I mean not to give an opinion) between an executor and a legatee of *personals*; of whom the executor may require security to refund, in certain cases, before he pays, or gives up the legacy.\*

One of the points insisted on by Mr. *Wickham*, was, that the Chancellor, instead of decreeing that the devisees should be *jointly* chargeable, ought to have directed a valuation of their lands respectively, and charged them *pro rata*. And I am of that opinion.

I deem it unnecessary to give any opinion upon the other points which were argued in this cause; as *these* are sufficient, in my opinion, to decide that the decree be reversed, and the bill dismissed.

Judge FLEMING. I have no difficulty in saying that I concur in the opinion just delivered, in every particular, for the reasons therein stated; that the bill ought to be dismissed: and the last point, made in the cause, in Mr. *Wickham's* statement, strikes me very forcibly; which is that, admitting the appellants (devisees of *James Mason*, their father) to be liable for the debt, it ought to have been apportioned among them, according to the value of their respective devises; of which an account ought to have been taken by Commissioners appointed for that special purpose; in order to prevent suits between the devisees themselves. But, as the *principal* point seems clearly in favour of the appellants, no farther notice need be taken of the *latter*.

Decree REVERSED, and BILL DISMISSED.

\* Note by the Reporter. It would seem, by analogy, from the case of *Atwell's Adm'r v. Milton*, 4 H. & M. 253. that a judgment against an executor or administrator is at least *prima facie* evidence against the legatees or distributees of the personal estate; though liable to be rebutted by shewing it was fraudulently or irregularly obtained.

Todd against Bowyer.

Thursday,  
October 25.

UPON an appeal from a decree of the Superior Court of Chancery for the *Staunton* District, dismissing a bill upon which an injunction had been granted, by the Judge of the late High Court of Chancery, on the 22d of *April*, 1796, to stay proceedings on a judgment obtained in *March*, 1794, in the County Court of *Botetourt*, on behalf of *Henry Bowyer, Clerk*, against *Samuel Todd, Sheriff* of that County, for 54*l.* 12*s.* damages, and 7 dollars and 43 cents, costs of suit.

The material ground of equity relied upon in the bill was, that posterior to the judgment, the complainant had discovered a settlement, according to which he was entitled to a credit for 18*l.* 10*s.* 7*d.* 3-4.

The defendant alleged in his answer, that credit had been given on the execution for 18*l.*, "which then appeared to him to be about the balance due the complainant at their settlement: but it would appear by accounts, furnished by the complainant at that settlement, that injustice had been done the defendant."

*May* 12th, 1798, upon a motion to dissolve the injunction, the Court referred the accounts between the parties to three Commissioners; two of whom, viz. *James Risque* and *Martin M'Ferran*, reported on the 30th of *April*, 1802, that, in the presence of the parties, they had proceeded to inspect an account exhibited to them by the complainant, which account appeared to have been settled by the parties, and shewed a balance struck in favour of the complainant of 18*l.* 10*s.* 7*d.* 3-4.; and that no documents were shewn to induce a belief that the said account and settlement were erroneous.

By an agreement dated *May* 16th, 1799, written on the back of the said order of reference, with a certificate of *James Risque* and *Martin M'Ferran* also endorsed thereon, under date of *April* 30th, 1802, (which certificate was verified by the deposition of *James Risque* taken *June* 25th, 1803,) it appeared "that the parties agreed that they had heretofore settled all accounts between them, except the claim of Clerk's tickets, for which the judgment was obtained; by which settlement there appeared a balance, in favour of the present plaintiff, of the eighteen pounds,

1. On a bill of injunction to a judgment at law, if it appear, on the final hearing, that the judgment ought not to be enjoined, and that the plaintiff in equity has had credit for a sum to which he is not entitled; the Court should not only dissolve the injunction, and dismiss the bill, but should moreover decree that the plaintiff pay that sum to the defendant.

2. During the pendency of a suit in Chancery, a settlement of accounts between the parties having been made, and reported to the Court; but, afterwards, by mutual consent, a new order of reference being made; the Commissioner was not precluded from examining the accounts generally, and correcting any error therein; especially, as it appeared that the party who was benefited by such error, had torn his own signature, and that of the other party from the settlement.

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which is credited on said judgment; but that balance the plaintiff alleged was 10s. 7d. more than the said credit, which the defendant was willing to admit rather than take the trouble of another investigation of their accounts;" that, "on the 30th of April, 1802, the complainant acknowledged in the Clerk's office of *Botetourt*, that he tore his own and the defendant's name from the said agreement, and contended he had a right so to do it being his own paper, and in his own custody." April 12th, 1803, the Chancellor for the *Staunton* District decreed that the injunction be made perpetual; with liberty to either party (being first served with a copy of the said decree) to shew cause against it on or before the tenth day of the next term. On the 11th of July following, "by consent of the parties, by their counsel," the order made on the 12th of April was set aside, and their accounts referred to Master Commissioner *Lockhart*; upon whose report (whereby some errors in former accounts (though acknowledged by the above-mentioned agreement, of May 16th, 1799, to have been settled) were corrected, and thereupon a balance, amounting to 55l. 6s. 5d. 1-2. was stated against the complainant,) it was decreed, that the injunction be dissolved, and the bill dismissed with costs; "and that the plaintiff pay the defendant the sum of 6l. 8s. 3d. 1-2. for which he had received a credit improperly."\*

From this decree the plaintiff appealed.

*Randolph*, for the appellant.

*Call*, for the appellee.

Friday, November 15. The President reported the opinion of the Court, that the decree be affirmed.

The following was Judge *TUCKER*'s opinion. After stating the circumstances, in substance as above, (in the course of which he observed that, "for the reasons apparent on the face of the answer, the judgment ought not to be enjoined,") he proceeded thus: "Although I approve of the principles of this decree, I have not been able to discover the particular items in the account stated by the Commissioner which would amount to the precise sum, for which the Chancellor mentions that the plaintiff had been in-

\* See *Fitzgerald, Executor of Jones, v. Jones*, ante, p. 1.

properly credited. I have therefore had recourse to the circumstances above stated as the basis of my own opinion. If *Todd*, by his unfair conduct, in tearing off his own and *Bowyer's* signatures from the agreement made between them on the 16th of *May*, 1799, (which was endorsed on the order of reference in the cause, and was evidently meant for the information and guide of the first set of commissioners appointed by that order,) had not brought himself within that rule of equity, 'He that doth iniquity shall not have equity,' I should have thought it highly improper to disturb that settlement. But, he having, by that act, imposed upon *Bowyer* the necessity of proving his accounts over again, I think the latter was fairly entitled to the benefit of any error which might thereafter be discovered therein. Approving, therefore, of the last commissioner's report, my opinion is, that the injunction be dissolved as to 55*l.* 6*s.* 5*d.* 1-2. including the costs of the judgment of *Botetourt* County Court; that the Chancellor's decree be reformed in that manner, as has been done on some other occasions;(a) and that the appellant, as the party prevailing here, recover the costs of his appeal here.

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(a) See 1  
Wash. 389.  
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Green against Price.

Thursday,  
October 25.

*FORTUNATUS GREEN* filed his bill in the Superior Court of Chancery, for the *Richmond* District, on the 1st of *March*, 1802, against *Thomas Price*, and the children of *Richard Littlepage*, deceased; for the purpose of obtaining a title to a tract of land, containing 261 1-2 acres, in the county of *Hanover*.

From the bill, answer of the defendant *Price*, exhibits and depositions, the following statement of the most material facts in the case may be extracted.

*Robert Bumpass* sold the land in question to *John Ferguson*, but did not make him a deed; neither does it appear in evidence how much money was paid by *Ferguson*; though the bill alleges (without proof) that he paid only 50*l.*, and the surveyor's fees. On the 7th of *May*, 1786, *Ferguson* gave a bond to *Benjamin Kimbrough* to make him a title to the said land, when he should himself obtain a deed from *Bumpass*; reciting in the condition of that bond that *Kimbrough* was to pay for the land, on or be-

1. A mortgagee without notice, shall be protected against a prior equitable title; if the person having such title, either encouraged him to take the mortgage, or, knowing of his intention to take it, stood by, and made no objection.



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fore the 1st of *January* ensuing, 150*l.*, and on or before the 1st of *January*, 1788, the farther sum of 175*l.*; provided the said *Ferguson* could then make a title; and, if he could not, it was agreed that the last-mentioned sum was not to be paid until such title should be made. The plaintiff alleges in the bill that, in *September*, 1788, he took *Kimbrough's* bargain, and, in *January*, 1789, received possession of the land, "*which he had retained ever since.*" It seems that, while a suit in the High Court of Chancery, by *Ferguson* against *Bumpass*, to obtain a conveyance for the land, was pending, *Richard Littlepage* bought the title of *Bumpass*, for 100*l.* cash paid by *Fortunatus Green*, the plaintiff, and for his benefit, as he alleged; but the deed, which was dated the 14th of *February*, 1794, was made to *Littlepage* himself, conveying absolutely "*to him, his heirs and assigns*, all the right and title of the said *Bumpass*, for the consideration of 100*l.* paid by him the said *Littlepage*," and warranting the right and title of the said land "*against the claim of any person or persons whatsoever, except the claim of John Ferguson, or his representatives, which now is in dispute.*" To this deed the plaintiff was one of the witnesses, and, partly on his testimony, it was recorded the 4th of *April*, 1794. The next day after its date, a writing under seal was executed from *Littlepage* to the plaintiff; setting forth that *John Ferguson* had contracted with *Robert Bumpass* for the said 261 1-2 acres of land which the said *Ferguson* took possession of and sold to *Benjamin Kimbrough*, who then disposed of it in the following manner; "*viz. 61 1-2 acres said to be sold to a certain Samuel Nuckolls, and the remainder to Fortunatus Green, who is now in possession of the said land, though the right still remains in Robert Bumpass, who had conveyed to Littlepage by virtue of a power of attorney. Now be it understood that Fortunatus Green hath this day advanced to me, (the said Littlepage,) as attorney for the said Bumpass, the sum of 100*l.*, which sum I do oblige myself to return the said Green with interest thereon from the date hereof, or make him a lawful right to the said two hundred acres of land. And I do further oblige myself as attorney for Robert Bumpass, and in behalf of the said Fortunatus Green, that no other person shall have a right to the 200 acres of land but himself, until he's returned the 100*l.*, with interest, as is before mentioned; for the faithful performance of which I do hereby, as attorney for Robert Bumpass, bind myself, heirs, &c. in the penalty of 500*l.**"

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The 2d of *March* following the plaintiff paid *Littlepage* a farther sum of 26*l.* 9*s.* for which he gave a receipt "promising to account for it in the same manner as for the 100*l.* received of him the last month on account of *Robert Bumpass*;" and signed "*Richard Littlepage for Robert Bumpass and self*." A farther payment of 8*l.* was made the 11th of *July*, and a similar receipt taken: and on the 20th of *May*, 1799, the said *Littlepage*, by a writing under seal, obliged himself, his heirs, &c. "that the balance of the money due him from *Fortunatus Green*, for the land whereon he lived, should remain in the hands of the said *Green* until he the said *Littlepage* should satisfy the amount of three executions which had been paid for him by the said *Green*."

It was fully proved, that, at the time the deed was executed from *Bumpass* to *Littlepage*, a witness advised the plaintiff, (who it seems was present,) "that it would be best for him to take the deed from the said *Bumpass* in his own name;" whereupon the said *Littlepage* observed "that, if the right should be made to him, it would put it out of the power of *Ferguson* ever to make the plaintiff a right; and that it would enable the plaintiff to recover three or four hundred pounds as damages of the said *Ferguson*; and that he would get his land clear;" to which arrangement the plaintiff assented.

It was further proved that, by the contrivance of *Littlepage*, and with the assent of the plaintiff, a declaration in ejectment was served upon the latter; the lawyer's fee for which appears to have been paid by the plaintiff to *Littlepage*; to whom he surrendered the possession of the land, and immediately resumed it as his tenant; agreeing to pay ten dollars a year rent, as long as he should remain on the land; that *Littlepage* afterwards declared that, after recovering the land by law of the plaintiff, he had sold it to him for a certain sum of money, and for the benefit of his claim against *Ferguson*; which sum of money and claim were understood, by a witness who stated what *Littlepage* said, to be in full discharge of the contract between them for the said land.

What became of the claim upon *Ferguson* does not appear in the record; but after all these transactions, (of which it does not appear that *Thomas Price* had any notice,) upon a settlement of accounts between the said *Price* and *Littlepage*, on the 17th of *February*, 1801, a balance of 156*l.* 2*s.* 3*d.* 1-2. being due from

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the former to the latter; and it being proposed that that balance should be taken by *Price* upon the plaintiff, the plaintiff readily agreed to it, (acknowledging himself to be still indebted to *Littlepage*, for and on account of the same land,) and expressed great satisfaction (at that time, and repeatedly afterwards) at this arrangement. A contract was then made between *Price* and the plaintiff, that *Price* should take in payment, his produce, at the highest *Richmond* cash price; that the plaintiff should do a job of brick-work towards payment of the debt, and that *Price* should let him have certain articles of the grocery kind for the use of his family at the *Richmond* cash price.\*

By a writing, dated the same day, (to which the plaintiff appears to have been privy, without making any objection,) *Littlepage* "obliged himself, whenever called upon by the said *Price*, to give him an instrument of writing vesting him the said *Price* with all the rights and immunities that he the said *Littlepage* holds in the 200 acres of land on which the aforementioned *Fortunatus Green* now lives; which right the said *Price* is to hold until the above-mentioned sum (of 156*l.* 2*s.* 3*d.* 1-2.) with the interest accruing, is fully paid."† The first of *March*, 1801, a mortgage on the said 200 acres of land was given by *Littlepage* and wife to *Price*, to secure the payment of the same sum of money, with interest, and proved in Court by one witness, the 21st of *May* following; but does not appear to have been fully recorded. A bill to foreclose that mortgage was filed in *Hanover* County Court against the children of *Richard Littlepage*, without making *Fortunatus Green* a party, and a decree for the sale of the mortga-

\* Note. It is alleged in the answer, that, "after the death of *Littlepage*, (which happened in a few weeks from the time of this transaction,) and not until then, the plaintiff began to prevaricate; and, after making several promises, and appointing several days to commence the brick-work according to his contract, at length declared he would do no work unless he received cash for the same; that he considered *Littlepage* as fully paid for the land, and that, notwithstanding his frequent promises, he would pay the defendant nothing." This allegation in the answer, is supported by several depositions, and not contradicted by any evidence.

† Note. This instrument of writing recited, in its commencement, that *Littlepage*, to secure the payment of the said balance, with interest from the date, had given an order on *Green*, which he had that day accepted, in favour of *Price*. But, probably, this was only a verbal order and verbal acceptance; for no written order is mentioned in any part of the record. In the answer it is said, (by a plain mistake,) not that *Littlepage* had given, but that, by the said instrument of writing, he obliged himself to give such an order.

ged premises obtained *December 22, 1802*; to which decree the present plaintiff obtained, on the 3d of *June, 1803*, from the Superior Court of Chancery, a writ of injunction to stay proceedings upon it until the further order of that Court.

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The prayer of the bill in this suit was, that the mortgage be *cancelled*, that all the defendants be compelled to join in a deed conveying to the plaintiff in fee the land aforesaid; or that he might receive any further or other relief more agreeable to equity. No answer was filed on behalf of *Littlepage's* children, and no proceedings against them appear in the record; according to which, on the 28th of *September, 1804*, "the papers in this cause were put into the hands of the Court, upon motion, by counsel for the defendant *Thomas Price*, to dissolve the injunction which had been awarded the plaintiff; but the cause being regularly set for a final hearing as to that defendant, the *plaintiff's* counsel moved the court to proceed to hear the same in chief as to him;" whereupon, the cause was heard *as to the defendant Thomas Price*, and the bill, *as to him*, dismissed with costs; from which decree the plaintiff appealed.

*Randolph*, for the appellant.

*Wickham*, for the appellee.

*Saturday, November 3.* The Judges pronounced their opinions.

Judge TUCKER. The only question in this case appears to me to be, whether a man, who, having an *equitable* title to lands, and, knowing of it, stands by, and either encourages, or does not forbid the *purchase*, (or, what is the same thing, the *mortgage* thereof to another,) shall be bound by the purchase or encumbrance thus made? In the present case, the complainant *Green* appears from the testimony to have encouraged Mr. *Price* to take the mortgage from *Littlepage*; and, by so doing, I conceive he has bound himself, and all claiming under him. I am of opinion, therefore, that the decree dismissing the complainant's bill be affirmed. (a)

(a) See 1  
Fonb. b. l. c.  
3. s. 4. 1  
Wash. 217.  
Hose & Harrison  
Adm'r. Ibid.  
2 Vern. 376.

Judge ROANE said it was a plain case for affirming the decree.

229. *Applebury and others v. Anthony's Ex'rs.* 1 Vern. 136. *Hobbs v. Norton.* 2 Vern. 376.  
*Draper v. Borlase.* 2 H. & M. 116. *Pollard v. Cartwright.*

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Judge FLEMING. This appears to be one of the clearest cases in favour of the appellee that ever came before a Court of Justice. There seems to have been a combination between *Littlepage* and *Green* (the latter of whom affects great ignorance) to swindle *John Ferguson* out of three or four hundred pounds; but in that nefarious business *Price* was no party: nor is he to be affected by it. The case is too plain to need further animadversion; and I shall only add that it is the unanimous opinion of the Court that the decree, dismissing the bill against *Price*, be **AFFIRMED.**

Wednesday,  
October 31.

### Clay against Ransome.

1. A defendant in ejectment is protected by 20 years' possession before the action brought; but the 5 years and 17½ days, excluded by the act of Assembly, are not to be counted in his favour.

2. If, therefore, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 17½ days, a venire de novo ought to be awarded.

UPON an appeal from a judgment of the District Court of *Prince Edward*, rendered for the defendant, the 4th April, 1805, in an action of ejectment on behalf of *Charles Clay* against *Elizabeth Ransome*.

The case was submitted, without argument, by *Samuel Taylor*, for the appellant, and *Munford*, for the appellee, and is sufficiently stated in the following opinion of Judge TUCKER; except that it may be proper to mention, that the claim of the lessor of the plaintiff, as set forth in the special verdict, was founded on a deed of mortgage dated the 20th of April, 1772, from a certain *Anthony Winston* (who was found to have been in possession at that time) to *James and Robert Donalds & Co.*; a decree of foreclosure, dated the 3d of October, 1797, against the heir at law and executor of *Anthony Winston*; and a deed, dated the 24th of January, 1798, to the lessor of the plaintiff, from the Commissioners appointed by that decree to sell the land. No possession by *James and Robert Donalds & Co.*, by *Anthony Winston*, or any person holding under him, either before or after the 20th of April, 1772, or by the lessor of the plaintiff, after the 3d of October, 1797, was found by the Jury.

Friday, November 2. The Judges pronounced their opinions.

Judge TUCKER. *Clay* brought an ejectment on the 17th of August, 1799, against *Ransome*. The Jury found a special ver-

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dict, which they conclude thus: "We find that *Flamstead Ransome*, the late husband of the defendant, was in possession of the land in question, from 1774, until his death, about ten years ago; and that the defendant hath been in possession thereof ever since;" and refer the law to the Court.

An ejectment is a possessory action, and only a competent remedy where the lessor of the plaintiff may *enter*: therefore, it is always necessary for the plaintiff to shew that his lessor had *a right to enter*; by *proving* a possession within 20 years, or *accounting for the want of it* under some of the exceptions allowed by the statute. *Twenty years'* adverse possession is a *positive title* to the defendant: it is not a bar to the *action*, or *remedy* of the plaintiff, only; but takes away his *right of possession*.

Every plaintiff in ejectment must shew a *right of possession*, as well as of property: and therefore the defendant needs not to *plead* the statute, as in the case of actions. (a)

Here the Jury have found an adverse possession for *more than twenty years*. But our statute of limitations (b) excerpts three different periods, from the 12th day of *April*, 1774, to the 20th of *October*, 1783; amounting, in the whole, to five years and 174 days. If *Ransome's* entry was made in the month of *January*, 1774, or at any time before the 23d or 24th of *February* in that year, his possession and that of his wife would amount to a complete bar, after deducting the period allowed by the statute. If his entry were after the 25th of *February*, the case will be within the saving clause of the statute. I am therefore of opinion, that the verdict is not sufficiently certain upon this point, and that there ought to be a *venire de novo* for that reason.

(a) 1 Burr.  
119 per Lord  
Mansfield.  
Bull. N. P.  
103. 3 Esp.  
N. P. 402. cit-  
ing Stokes v.  
Burry, Salk.  
421. 1 Lord  
Raym. 741.  
Runnington's  
Law of Eject.  
119 accord-  
ant.  
(b) 1 Rev.  
Code, c. 76.  
s. 11. p. 109.

Judges ROANE and FLEMING concurred. The judgment was therefore unanimously reversed, and a *venire de novo* awarded.

Monday,  
November 26.

Mason against Dunman.

1. A man on his death bed, at his own house, and in his proper senses, sent for a neighbour to make his will, who took notes thereof in his presence, and in that of another witness who was present all the time, and heard the sick man request the first witness to make his will, and direct each note to be taken. A third witness was not present when the first began to take notes, but was present afterwards, and heard some of the notes dictated. Two of the witnesses swore that the notes, or most of them, were read to the decedent, but were not positive that the whole were; nor did the sick man read them himself; but he was then in his proper senses. After the first witness had made a draught of a will from the notes, the decedent was incapable of reading, or hearing it read; being at that time delirious.

The notes taken as aforesaid were established as a good nuncupative will.

AT a Court held for Lunenburg County, the 12th of July, 1804, a paper was off-red for probate as containing the nuncupative will of *John Dunman*, deceased.

The evidence offered in support of the probate was that of a certain *John Blackwell*, "who swore that he was sent for by the decedent for the purpose of making his will; that the decedent asked him whether he would write the will there, or take notes or hints upon paper or slate, or words to that effect, and go into another room to write it; that the witness took notes, in the presence of the decedent, at his dwelling, and in his last illness," (which are set forth in *hæc verba*, in a bill of exceptions,) "from which notes he drew a will in another room;" (also set forth in like manner, and bearing date on the 6th of March, 1804;) that he read over, as he drew the notes, some of them to the decedent, but is not positive that he read all of them; that, after he had taken all the aforesaid notes, he did not read them over to the decedent; neither did the decedent read them to himself; but the witness believed the decedent was of sound mind at the time of taking the notes; but that, after he had drawn the will from the notes, the decedent was incapable of reading it, or hearing it read, being at that time delirious." *Sterling Davis*, another witness, swore that "he was not present when said *Blackwell* began to take said notes, but was present before they were finished, and heard the decedent direct some of them to be taken; but does not recollect their purport." This witness "thought the decedent was of sound mind." *William Barnett*, a third witness, (having previously, in Court, relinquished and released all benefit which he might be entitled to under the will of *John Dunman*, deceased, in case the same should be established,) swore, "that he was present at the time the notes were taken, and held the candle for the said *Blackwell* to take them by, and heard the decedent request said *Blackwell* to make the said will, and direct each note to be taken;" at which time the decedent "was of sound mind." The witness was certain that the greater part of the notes, as they were taken, were read to the decedent; and

believed, but was not certain, that he heard the *whole* of them read. He believed that the notes "above annexed" were the notes then taken by the said *Blackwell*; and averred that he (the witness) was no way related or connected with the decedent, who, when in health, frequently before his illness, expressed his determination to leave half his estate to the children of the said witness. *John Williams*, a fourth witness, swore that the testator frequently before his death, when in good health, declared that he intended to make the children of his brother *Joseph Dunman*, and of *William Barnett*, his heirs. Upon this evidence, the County Court admitted "*the said paper*" to record as the nuncupative will of *John Dunman*; and that order was affirmed by the District Court; whereupon *Peter Mason* (who, with *Sally* his wife, and others, children of *James Dunman*, deceased, had been originally summoned to shew cause, if any they could, against the *probate*) appealed to this Court.

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According to former decisions, the Clerk of the District Court was summoned and attended with the *original notes* and *draught of the will* made by *John Blackwell*; from which, as well as the copies inserted in the transcript of the record, a difference appeared between the *notes* and the *draught*, in this, that the *former* contained a clause whereby the testator bequeathed to his mother a yoke of steers during her natural life, and, at her decease, to be sold to pay her debts, and the residue of his own debts, if any; which clause was omitted in the latter.

*Wirt*, for the appellant. In the present case the paper exhibited for probate was offered as a *nuncupative* will, and received by the Court as such: but it is evident the testator's intention was to have a *written* will. The notes were taken only as *hints* to lead to a will, but not as the will itself. Can a man make a nuncupative will without intending it? If the Court should so decide, they would convert into a will what was never intended to be one, and, in effect, *make* a will for the decedent.

But, if this was intended as a nuncupative will, the requisitions of the act of Assembly<sup>(a)</sup> were not complied with: for it is not proved that the testator called on any person present to take notice, or bear testimony, that such was his will, or that he used any words of the like import.

(a) 1 Rev.  
Code, p. 161.  
c. 92. s. 5.



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*Munford*, for the appellee. The requisitions of the act of Assembly are substantially complied with in this nuncupative will. The witness who took notes of the will does not say, *totidem verbis*, that the testator told him, or others, to take notice that such was his will; but that he sent for him *for the purpose of making his will*; that, when he came, he asked him whether he would *write his will* there, or take notes or hints upon paper or slate, and go into another room to write it; that the witness, thereupon, in the presence of the decedent, took notes which he dictated, and which are evidently very particular and accurate, and clearly intended as a will. - These circumstances must be equivalent to the "*words of like import*" required by the act of Assembly.

It is said, that these notes were intended to be reduced into form; and that the testator did not declare them *his will*, but only that he *intended them to be his will*, when reduced into form, and approved by him. But a will is only "the legal declaration of a man's intentions" which he wills to be performed after his death." (a) A declaration, therefore, that certain words *are his will*, and, that he *intends them to be his will* when committed to writing and reduced into form, must be good as a nuncupative will, which is sufficient, (if legal in other respects,) though verbally made, and *not in form*. Indeed, the words themselves, though not committed to writing at all, would have been sufficient if recollected by the witnesses within six months; and, *after six months*, if committed to writing within *six days*. (b) The words themselves were, in truth, the nuncupative will. The writings in question are only *evidences* to prove (or, rather, to corroborate the parol testimony) that such words were spoken.

No doubt, in all cases of nuncupative wills, the testator intends to have his will reduced to writing, and signed, if he shall live long enough to accomplish it: and it is the very disappointment of this intention, that makes it *bad as a written will*, but (in case the other requisitions of the law be complied with) *good as a nuncupative will*. I grant the testator's intention, as to the disposal of his property, must remain unchanged; that is, no declaration of a change of intention must appear. But in this case there was no evidence of any change of intention. In *Cogbill v. Cogbill*, 2 H. & M. 467. the great principle upon which the memorandum was established as a good *codicil* was that no change of intention

(a) See Judge appeared. (a) In this case, *John Dunman's* declaration of his intention. (b) See Judge Roane's and Fleming's opinions throughout; particularly p. 511, 513, 514, 522, 524.

tion, concerning the disposal of his property, was not incomplete, or conditional, but positive. There was indeed an implied condition annexed to the directions given *Blackwell* relative to the formal draught of the will, that it should conform in substance to the notes dictated by himself. If that condition was broken, *that paper* might have been objected to, and not signed by him, had it been presented to him. But the validity of that paper is not indispensably now in question. The notes taken in his presence, to which notes no condition or reservation was annexed, expressed the nuncupative will, and ought to be established as such, even if the other paper should be rejected.

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*Wirt*, in reply. The draught in the form of a will is the paper tendered, for probate, as the nuncupative will; and it cannot be received as such, because it does not agree with the notes. The intention of the Legislature in using the expression, "words of the like import," was to dispense with any particular form of words, but not to dispense with a public declaration that the words were spoken with an intent to bequeath. But here the testator only gave hints to write a will, and uttered, in reality, no testamentary words. A flood of frauds, corruptions, and ingenious contrivances may be let in, if a will be established under such circumstances as these.

*Wednesday, November 28.* The Judges pronounced their opinions.

Judge *TUCKER*, after stating the case. The witnesses not being positive that all the notes taken by the first witness, in the presence of the testator, and by his direction, were read over to him, and approved by him, after they were committed to writing,\* I am of opinion that the Court did right in considering those notes as too imperfect to be established as a written will; and the draught, when completed, not being read to him, nor approved by him, must be considered liable to the same objection. But, although those notes were not, for the reasons just mentioned, to be considered as a written will, I think the court judged very properly in admitting them to record, as containing the substance of a nuncupative will, made by the decedent, in extremis, at his own house, and in his proper senses.

\* See 2 Bl. Com. 508.

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Judge ROANE. I am clearly of the same opinion. The *notes* taken by the bed-side of the dying man were a good nuncupative will; but, as it does not appear clearly whether the Court below meant to establish the *notes*, or the *draught* of a will, I think it would be proper to express it to be the intention of this Court to establish the *notes*; especially as there is a slight difference between *them* and the *draught*.

Judge FLEMING. This is a plain case, that the *notes* are a good nuncupative will, better authenticated than any I have seen. But the *notes* ought to be established, instead of the *draught*; there being a slight difference between the two papers, merely as to the disposal of the money arising from the sale of certain *oxen*.

Judgment unanimously affirmed; and the Clerk (to prevent misconceptions) directed to enter the notes *verbatim* in the order-book.

Monday,  
November 18.

Day, Executor of Yates, who was Executor of Payne, against Murdoch, surviving partner of Cuninghame & Co.

1. A payment  
in paper money,  
by a British

debtor to an American creditor, operated a full discharge to its nominal amount, of a current money debt, contracted in specie; notwithstanding the creditor made objections to receiving the paper money, and observed, at the time, that he would keep it safe for the debtor, but did not consider it as a payment, though intended as such by the debtor; and notwithstanding the receipt contained a reservation that, since the creditor had demanded the debt when the rate of exchange was at 15 per cent. he therefore claimed so much as might be allowed him on that account by arbitrators afterwards to have been (but who never were) appointed.

2. A factor and agent for a company of British merchants having, in the year 1771, purchased, on their behalf, a tract of land in Virginia, for a sum of money payable on demand, and then received possession thereof for their use; and a credit for the money having been entered in their books: the equitable title to, and possession of, such land was thereby completely vested in the company; and, under the act of May session, 1773, "concerning escheats and forfeitures from British subjects," the same escheated to the Commonwealth, which, on inquest found, became entitled, in the same manner the company were entitled; but subject to the payment of so much only of the purchase money, remaining due, as did not exceed the net amount for which the land was sold by the escheator, reduced to present current money, according to the 2d section of that act; the said British company being still liable for the residue of the said purchase-money.

3. Upon an appeal from a decree in Chancery, an error to the injury of the *appelles* ought to be corrected, although he did not appeal.\*

\* Note. The Court have since, to wit, on the 2d of October, 1811, established the following GENERAL RULE. "It is the opinion of this Court, founded as well on a

*William Cunningham & Co. British merchants, and Walter Colquhoun, their agent in this country, to attach in his hands so much of the effects of the said company, (the partners being residents in Great Britain,) as would be sufficient to satisfy two claims for debts due from them to the said Daniel Payne in his life-time; the first being a balance of account, on the 1st of September, 1774, of 373*l.* 11*s.* 7*d.* current money, and the other 491*l.* 19*s.* 10*d.* sterling; of which last-mentioned sum, 400*l.* was the price of certain houses and lots in the town of Dumfries, sold by the said Payne to John Neilson, an agent of the said company, for their use, some time in the year 1771, and the residue was a balance of account.*

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The material circumstances relative to each claim (as collected from the bill, answer, depositions and exhibits) were the following.

The currency debt was admitted to have been originally due as stated; but the point in dispute related to a subsequent payment of 423*l.* 19*s.* in paper money, by a certain *James Robinson*, (a factor and partner of the company,) to the said *Daniel Payne*, on the 4th of *April*, 1777. The question was whether this payment, which, at its nominal amount was equal to the principal and interest of the currency debt, was to be considered as a full satisfaction thereof, or to be credited at its value, according to the scale of depreciation. It appeared that *Payne* was very unwilling to receive the paper money, but was induced to do so by *Robinson's* threatening to lodge an information against him with the committee of safety; that, when he received it, he put it in his desk, observing that he would keep it safe for the company, but *did not consider it as a payment*. He gave a receipt in the following words: "Received, *April* 4th, 1777, of Mr. *James Robinson*, 423*l.* 19*s.* current money of *Virginia*, being the amount of the principal and interest due to me in currency by Messrs.

full consideration of the law, as on various decisions which have heretofore been had, that, in future, where a judgment or decree is reversed neither in the whole, nor in part, on the ground of error against the appellant, or plaintiff, in any appeal, writ of error, or supersedeas; yet, if error is perceived against the appellee, or defendant, the Court will consider the whole record as before them, and will reverse the proceedings, either in whole, or in part, in the same manner as they would do, were the appellee or defendant also to bring the same before them, either by appeal, writ of error, or supersedeas; unless such error be waived by the appellee, or defendant; which waiver shall be considered a release of all errors as to him."

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*William Cuninghame & Co.* of Glasgow, at their *Dumfries* store, and exclusive of the sterling sum owing for the lots that I sold them; nevertheless, I demanded the currency debt when the rate of exchange was at 15 per cent.; if, on arbitration hereafter to be had, it should be determined that I am entitled to an allowance on that account, the said company are hereby subjected to such allowance. *Dan. Payne.*"

It was contended by him that, in consequence of the demand mentioned in that receipt, the debt in question should be considered as turned into *sterling* at the rate of 15 per cent. difference of exchange; and he alleged that this had been consented to, on the part of *William Cuninghame & Co.* as a consideration for further forbearance of the debt; but of this there was no proof. It was stated in the deposition of *Walter Colquhoun*, (who, it seems, did not answer the bill as a defendant, but was examined as a witness,) that *Payne* never made him any offer of leaving the conditional clause in the receipt to the decision of arbitrators; that, subsequent to his death, his executor *Yates* wrote a letter to the deponent as agent for the company, touching an arbitration; to which he answered that, if it was meant to open the whole transaction, he did not feel himself at liberty to consent; but, if the matter in controversy be considered as restricted to the claim, in Mr. *Payne's* receipt, respecting the exchange, he might, unless counselled to the contrary, consent to the leaving of that point, as the only disputable one, to the decision of arbitrators; that no written reply was given, but the deponent understood the limitation proposed would not be agreed to.

As to the debt in *sterling* money; it appeared that a verbal contract was made by *John Neilson*, factor for the company, in the year 1771, for the purchase of the houses and lots aforesaid of *Daniel Payne*, at the price of 400*l.* sterling, payable on demand; that possession was then given to the said factor for the use of the Company, and a credit for the money entered in their books; that no deeds were executed; *Payne* having refused to make any, since the money was not paid, and choosing to retain the legal title in himself as security for such payment; that the said lots and houses were afterwards confiscated as the property of *British* subjects, and that he (although requested by *Adam Newall*, an agent of the Company) did not interfere to prevent it, by setting up his legal title against the claim of the

Commonwealth. The Company therefore, contended, that they ought not to be compelled to pay the said purchase-money. 'It appeared, moreover, that four bonds belonging to the said Company, and amounting to 1,971*l.* 4*s.* 6*d.* 1-2. were put into the said *Payne's* hands on the 4th day of *February*, 1786, as security for his claims; of which bonds one for 233*l.* 10*s.* 10*d.* was returned to *Walter Colquhoun*, their agent, on the 31st of *July*, 1789, but the other three (with two bills of sale as additional security to two of them) were said to have been retained by the said *Payne* and his executor.

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The Chancellor made a general order of account, *March* 15, 1800; and, afterwards, on the 18th of *May*, 1801, "having considered allegations of parties, their proofs, and the arguments of counsel, directed the Commissioner, in stating the accounts between the parties, to debit the plaintiff's testator with the *value* of the money (which he acknowledged himself to have received) according to the statutory scale of *depreciation*, and not to debit the defendants with the consideration money which they had agreed to pay for the houses and land in *Dunfries*." The Commissioner made a report accordingly, finding a balance against the defendants (after charging them with rent for the said houses and lots during the time they were occupied by their agents) to the amount of 465*l.* 11*s.* 2*d.* to bear interest from the 4th of *April*, 1777; (the date of the receipt for the money paid as aforesaid on account of the currency debt;) about which time *James Robinson*, the factor and partner of the Company, with all their clerks, storekeepers and assistant storekeepers were obliged to leave the State under the resolution of the Assembly, dated the 18th day of *December*, 1776, for enforcing the statute staple of the 27th *Edw.* III. c. 17.

This report was confirmed by the Chancellor, and (omitting eight years' interest for the time of the war) he decreed to the plaintiff the balance reported, with interest from the 4th of *April*, 1785: from which decree the plaintiff appealed.

*Warden and Botts*, for the appellant.

*Williams and Wickham*, for the appellee.

*On the part of the appellant*, it was contended that the decree

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was erroneous in not allowing the purchase-money for the lots and houses in *Dumfries*. This bargain was made before the statute of frauds was adopted in this country. A parol agreement, at that time, would have been enforced in equity, even without part performance. But here there was part performance, *Cunningham & Co.* were put into actual possession, and made considerable improvements. The land was their property, and the money the property of *Payne*. He had a right to go against them personally as debtors, though, it is true, he retained a lien on the land. He might waive his lien if he chose, but this could not deprive him of his personal remedy.

The bargain being obligatory on him, he could not have prevented the sale by the escheator: for, if he had filed a *monstrans de droit*, the previous sale to *Cunningham & Co.* would have barred his right; and he was not bound to have committed a fraud on the government by representing the land as his own. If, then, he has done no wrong, how has he forfeited his right?

According to the contract, *Cunningham & Co.* ought to have paid the money immediately; whereupon, a deed would have been made, conveying to them the legal title; if which had been done, it is admitted on all hands, nothing could have saved the land from the claim of the Commonwealth. Shall they be benefited by their own wrong, and put in a better situation than if they had paid the money. The doctrine laid down in 3 *Dall.* 225. shews that, as *British* subjects, they were personally liable for the acts of their government.

On the other side, it was said that the jurisdiction of the Court of Equity in this case could be supported only by taking this as a bill for *specific performance*. Considering it as such, the Court has a discretionary power to grant or withhold relief. No man shall demand equity without doing equity; so, also, without having done equity. It was *Payne's* duty to protect our rights, and, not having done it, he is not entitled to a decree. He must be presumed to have had it in his power to assert all his legal rights, the act of Assembly (a) having provided for the protection of such rights. The Commonwealth could only take, subject to the rights of *Payne*; nothing but the rights of *Cunningham & Co.* being confiscated.

(a) Ch. Rev.  
66.

(b) Ch. Rev.  
99. 106. 118.

As a creditor, also, *Payne* was protected. (b) There can be

no doubt that he might have secured himself in the mode pointed out by one or other of the laws on this subject. An ample fund, therefore, existing, in the lots and houses themselves, out of which he might have been paid, it was his duty to resort to that fund, and not to *Cunningham & Co.*; according to the maxim that "no right ought to be exercised in a manner prejudicial to the rights of others."(a)

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(a) 2 Fend. p.  
397. b 3. c. 2.  
a 6. note (i).  
1 H. Bl 136.  
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Ch. 396. S C.  
3 Bro. Ch.  
54 Peters v.  
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In reply it was observed that this was not a bill for *specific performance*. The plaintiff came into equity on the ground that the defendants were out of the Commonwealth, and he could not sue them at law. This was the only circumstance which ousted the Court of Law of its jurisdiction. *Cunningham & Co.* were not entitled to a deed, but upon payment of the money; and, now, upon payment of the money, a deed may be made them, conveying all the right remaining in *Payne's* representatives.

On the part of the appellees, also, the decree was said to be erroneous, in directing the paper money payment to be *scaled*. The scale applies only to subsisting *debts* unpaid, but *not to payments*; for the law is positive that all actual payments in paper money shall be good at their *nominal amount*. This, being an error to the injury of the *appellee*, ought to be corrected, *though he has not appealed*. If there be one error in favour of the *appellant*, and another in favour of the *appellee*, the Court will direct *both* to be corrected. Where a balance of account is to be struck, and the sum of errors on both sides to be calculated, the Court must look into the whole business, and correct *all* the errors. For this reason, after a decree for an *account*, the plaintiff cannot dismiss his bill; but a balance of account may be decreed to the defendant; as was done the other day in *Todd v. Bowyer*.(a)

(a) *Ante*, p.  
447.

To this it was objected, that *Payne* was not obliged to take paper money between 1770 and 1774; when he demanded payment, and *Cunningham & Co.* failed to pay. The particular wording of the receipt of the 4th April, 1777, proves this, and shews that, in *equity*, the payment should be *scaled*.

The counsel for the appellee contended, *contra*, that the word-



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ing of the receipt proved nothing, but that *Payne* wished to get over giving a receipt. It was, nevertheless, a plain receipt in full.

*Friday, November 30.* The following was entered as the opinion of the Court, consisting of Judges ROANE and TUCKER.

“ The Court, having maturely considered, &c. is of opinion that the said decree is erroneous: therefore, it is decreed and ordered that the same be reversed and annulled, and that the appellees pay to the appellant the costs as well by him as by his testator expended in prosecuting his appeal aforesaid here. And this Court, proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, is of opinion, that the payment of 423*l.* 19*s.*, current money by *James Robinson*, for and on account of the appellees, to *Daniel Payne*, on the 4th day of *April, 1777*, which is acknowledged by said *Payne* to have been the full amount of the principal and interest then due to him, in current money, was a full payment and extinguishment of that debt, notwithstanding the demand made by the said *Payne*, that the same should be turned into sterling at the rate of 15 *per cent.* difference of exchange, and the reservation by him, of a right to claim the same in future; the commutation aforesaid of that debt, being neither agreed to by the debtors, or their agent, (and, if consented to as a consideration for further forbearance of the debt, as alleged by the said *Payne*, was probably a device to elude the provision of the statute of usury, and therefore void,) nor being established by the award of arbitrators, according to the tenor of the receipt granted by the said *Payne* at the time of the payment aforesaid; nor, if this bill was intended to procure the decision of the Court of Equity in lieu of that of the arbitrators upon that question, does it appear that the appellant has any just right to claim the addition or commutation aforesaid; and that therefore the bill should, as to the appellant, be dismissed, so far as it relates to that article, with costs; but that, on the other hand, the appellees, although they have not appealed from the decree in question, ought to be allowed the benefit of the nominal amount of the payment aforesaid, which ought not to be subjected to the operation of the scale of depreciation established by law; that sum forming only one item of the account between the

parties, and its allowance in full to the appellees not changing the result of the decree, which will, under the opinion of this Court, as now declared, be still rendered more favourable to the appellant.

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“ And this Court is further of opinion that, by the contract and agreement between *John Neilson*, factor and agent for the said *William Cuninghame & Co.*, and made in their behalf with *Daniel Payne* in the year 1771, and not disapproved of, but acquiesced in by them, for the purchase of the said *Payne's* lots and houses in the town of *Dumfries*, for the sum of 400*l.* sterling, payable on demand, possession whereof was then given, and a credit for the money entered in the books of the Company, as appears by their answer, the equitable title and possession was thereby completely vested in the said *William Cuninghame & Co.*, who might at any time have coerced a legal title from the said *Daniel Payne*, by paying or tendering to him the purchase-money, until the said *Daniel Payne* was absolved from that obligation by the Acts of the Legislature of the Commonwealth of *Virginia*, and the proceedings had under the same, confiscating the rights of the said *William Cuninghame* and Company in and to the same.

“ And this Court is further of opinion, that the retention by the said *Daniel Payne* of the said legal title as a security for the payment of the purchase-money for the said lots and houses did not impose it upon him as a duty, by any sinister act or device, to endeavour to protect the property therein of the said *William Cuninghame & Co.* from confiscation; more especially, as it appears, from their own shewing, that they had one or more agents or factors in this country during the whole period of the revolutionary war, who were equally competent to have defended the same; and that the said *Daniel Payne* is not responsible for the confiscation and sale thereof, which he could not probably have prevented, as the Commonwealth, by the act “ concerning escheats and forfeitures,” became entitled in the same manner as the said *William Cuninghame & Co.* were entitled, subject, nevertheless, to the payment of the consideration agreed to be paid by the said *William Cuninghame & Co.* for the same.

And this Court is further of opinion, that the appellees are still liable to the representatives of the said *Daniel Payne*, for any part of the said consideration money which may remain due

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beyond the net amount of the consideration for which the lots and houses aforesaid were sold by the escheator of the Commonwealth, after deducting all just and reasonable expenses of the sale of the same, reduced to current money of this present period, according to the directions of the act of *May, 1779, c. 4. s. 2.* "concerning escheats and forfeitures from *British* subjects," according to the rate of exchange between current and sterling money at the time when the final decree shall be made in this cause, with interest thereupon from the time of the institution of this suit; and if the bonds, mentioned in the exhibit No. 6. have been retained by the said *Daniel Payne*, or his representatives, as is suggested in the answer, that the same, upon the performance of this decree on the part of the appellees, shall be delivered up to them, the appellant accounting with them for any moneys, which may have been received thereupon by himself, or his testator *Charles Yates*, or the said *Daniel Payne*, or any other person to his or their use.

"And the cause was remanded to the said Superior Court of Chancery, with liberty to the appellant to make the Commonwealth, or those claiming under it, parties thereto, if he shall be so advised."



Friday,  
November 16.

### Benjamin Watkins Leigh's Case.

1. The practice of LAW is not an office or place under the Commonwealth.

2. An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 3d section of the act to suppress duelling.

*MR. LEIGH* having on a former day of this term asked permission to qualify as counsel at this bar, it was then resolved by the whole Court, that in addition to the oaths of qualification heretofore usual in such cases, he must take the oath prescribed in the 3d section of the late act to suppress duelling: which he said he would consider of, and for the time declined. And now, by leave of the Court, he again moved to be admitted to the bar, on his taking the usual oaths, without the additional one last mentioned. He flattered himself he should be able to convince the Court that its first impression on this subject, formed and expressed as it was without argument, and on the sudden, was incorrect; in which, if he should have the good fortune to succeed, he should have no doubt or apprehension which would preponderate with that tribunal, the love of justice or the pride of consistency.

The act directs, "that from and after the passing thereof, every person, *who shall be appointed to any office or place, civil or military, under this Commonwealth* shall, in addition to the oath now prescribed by law, take the oath" therein prescribed. Mr. Leigh insisted, that the practice of law was not an *office or place under the Commonwealth*, within the meaning of the act; that the act intended *public* offices only, and not *private* ones of any kind.

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I agree, said he, it is laid down, generally, that attorneys at law in *England* are in all points officers of the respective Courts in which they are admitted. 3 *Bl. Com.* 26. But their character of officers of Court in *England*, is derived from certain restrictions they are under, and privileges they enjoy, in THAT country, unknown in THIS. In *England*, attorneys cannot be bail in civil cases; nor can attorneys at law practise as solicitors in Chancery; nor attorneys in *one* of the Courts of *Westminster* in any *other*; nor can they be called to the bar, till struck off the roll of attorneys; nor, if once admitted barristers, enrolled as attorneys again, till disbarred at their inns of Court; and they must not only be examined and sworn, (as here,) but must be enrolled, and must have served five years' previous apprenticeship as attorney's clerks. *Doug.* 114. 466, 467. 3 *Bl. Com. ubi supra.* Stat. 4 Hen. IV. cap. 18. cap. 23. 2 Geo. II. cap. 27. 12 Geo. II. cap. 13. 22 Geo. II. cap. 46. 23 Geo. II. cap. 26. 30 Geo. II. cap. 19. On the other hand, attorneys cannot, regularly, be held to special bail; they must be sued by bill, not by original; they can only be sued in the Courts they belong to; and they are exempt from serving in offices they may be elected to against their inclination. *Doug.* 312. 1 *Bac. Abr.* 191. *T. Raym.* 179. 1 *Lev.* 265. And to prove that this character of officers of Court attached to attorneys in *England*, springs from these restrictions and privileges, Mr. Leigh remarked that (king's counsel excepted) serjeants and barristers at law, who are subject to such restrictions, and have no such privileges, take no oath of office, and are not deemed officers of Court. 3 *Bl. Com.* 28. Now, in *Virginia*, no such restrictions or privileges exist: here ATTORNEYS are COUNSEL. In *England*, too, it was formerly held that attorneys were compellable to act. *Co. Litt.* 295. b. But it has been since adjudged, that an attorney is not compellable to appear for any one, unless he take his fee, or back the warrant. 1 *Salk.* 87. And even if the law, as stated by

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Sir *Edward Coke*, has not been thus exploded; still *counsel* were never thought compellable to act; (*Harg. Co. Litt. ubi supra. n. 1.*) and as in *Virginia*, the characters of ATTORNEY and COUNSEL are inseparably blended in the same person, so that one cannot be engaged as ATTORNEY, without being engaged as COUNSEL, in which latter capacity he is, on no principle, compellable to act; it results, that no part of the profession is so compellable in this country. ATTORNEYS, therefore, are no more officers of Court HERE, than COUNSEL are in ENGLAND. A class of men they are, indeed, in THIS as well as in THAT country, concerned in the administration of justice, to whose diligence, integrity, ability and honour much is necessarily confided, while from situation they are exposed to peculiar temptation; and ON THAT ACCOUNT subjected to examination and probation, sworn to do their duty, regulated by rules of policy and practice, and liable to summary punishment and privation for unworthiness or misconduct. But these, their ONLY TRAITS OF THE OFFICER KNOWN TO OUR LAW, they have in common with jurors: jurors, as well as attorneys, are necessary in our system of jurisprudence, are selected, sworn, regulated, and summarily punishable for misbehaviour. Attorneys, therefore, are no more than jurors officers of Court in Virginia.

But granting that attorneys are on the same footing here as in *England*; that they are officers of Court; still, Mr. *Leigh* contended, they are not public officers within this act.

In fixing the legal construction of this our test, said he, I could not, for curiosity, forbear looking into the construction put by *English* legislators and lawyers, on their corporation, test and abjuration acts; which are known to have been enforced and interpreted in a spirit that the most rigorous expounder of *our* test, cannot except against. And here every thing confirmed my position.

By the test act, stat. 25 Car. II. c. 2. it was enacted, "that every person that shall bear any office, civil or military, or shall receive any salary, fee or wages, by reason of any grant from his majesty, or shall have command or place of trust under his majesty, or by his authority, or by authority derived from him, within *England*," &c. shall take the oaths of supremacy, &c. Now, within this statute, (of which the words are stronger than those of ours,) it seems, attorneys and counsel were not supposed to be included, as holding offices or places of trust under the king, or un-

*der authority derived from him; otherwise Parliament would not have thought it necessary to subject them to the test by a special statute, as they did by 7 and 8 Wm. III. c. 24.*

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By the abjuration act, 13 Wm. III. c. 6. it was enacted, "that every person who shall bear any *office, civil or military*, or shall receive any pay by reason of any grant from his majesty, or shall have command or *place of trust under his majesty, or by authority derived from him*, within *England, &c.* and all ecclesiastical persons, members of colleges, &c. and all persons teaching pupils, &c. and all preachers, &c. and every person that shall act as a serjeant at law, counsellor, barrister, advocate, attorney, solicitor, clerk or notary, by practising as such in any Court, shall, within three months after they enter upon such office, *or take upon them such practice,*" take the oath of abjuration, &c. Upon which Mr. Leigh remarked, that the alternative words (*or take upon them such practice*) plainly referred to the LEGAL CHARACTERS before mentioned; and shewed that the parliament did not deem their profession, nor was it generally understood to be, AN OFFICE OR PLACE UNDER GOVERNMENT; if they had thought so, those words would not have been inserted.

And by the corporation act, 13 Car. II. stat. 2. c. 1. it was enacted, "that no person shall be *placed or chosen* in any office of mayor, alderman, recorder, bailiff, town-clerk, common council-man or other office of magistracy, *place, trust, or employment, concerning the government* of any city, borough, or cinque port, and *their members*, or other port town, that shall not within one year next before such choice have taken" the oaths of supremacy, &c. and in default thereof, every such *placing and choice* is declared void. Mr. Leigh thought that if *any words* would include the attorneys of Corporation Courts, as *officers or placemen*, those of this statute would. Yet it had been expressly adjudged, that an attorney was *not an officer within that act*. *T. Raym.* 56. 94. *S. C. Sid.* 94. 152. 1 *Keb.* 340. 354. 387. 558. 675. Which he took to be a direct decision of the very point now in discussion. In all the notices of this case, the only question ever raised was, whether an attorneyship was such a place as that a *mandamus* would lay to restore one to it; and it is decided that of an attorneyship in the common bench, to which the profession here is in that respect analogous, no *mandamus* in any case would lie, because of the Court's summary

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power of removal: but no doubt was ever entertained, that the attorney was not within the corporation act. It had been even doubted, whether a censor of the college of physicians (who by the acts of incorporation, stat. 32 *Hen. VIII.* c. 40. and 1 *Mary*, stat. 2. c. 9. must be sworn in office, is compellable to officiate, and is vested with large powers of fine and imprisonment) *was a public officer within this act.* 5 *Mod.* 431.

The *English* lawyers, judges, and parliament, therefore, in the utmost fury of religious zeal, gave not to *stronger* words, so large an interpretation, as had been given to the *far weaker* words of our act to suppress duelling.

But, said Mr. *Leigh*, a reference to our own institutions will place the true meaning of this statute in a yet more striking light; and ascertain, beyond doubt, the justness of the construction I contend for.

The act itself furnishes one clear criterion of its meaning. When the legislature ordains that an officer shall take an oath to observe a particular law *during his continuance in office*, (such are the words of the oath,) surely it alludes to such offices as are wont to be formally resigned and vacated. This act, therefore, could not have alluded to the practice of the law, of which an actual resignation is unheard of. It is true, judicial and some other offices are, from obvious policy, incompatible with such practice; but if the incompatible office be abandoned, professional rights are *ipso facto* restored. If, for example, a Judge of this Court were to resign his station, surely he might resume his practice in his former courts, without qualifying anew.

It must be agreed, that if the profession of the law be an office or place under the Commonwealth at all, it is a *lucrative* one: Now the constitution of *Virginia* expressly provides, that all persons, "*holding lucrative offices*, shall be incapable of being elected members of either house of assembly, or the privy council." Art. 14. If then the construction I am controverting be right, lawyers are excluded from the assembly and the council. Yet the framers of the constitution, most of whom sat in the first assembly under it, and their successors ever since, never (as we know) had any such idea. The whole practice of the constitution from its origin to this day, the contemporaneous, the present, the constant exposition of it, refutes this inference; and, by consequence, explodes that construction, of which it is the

direct induction; that attorneys are officers under government. I never heard of but one doubt on this point, which was started by one member of the last Assembly. Nay, some of our ablest men have much doubted whether the appointment of State's Attorney in the County Courts, *is an office under government*. In the Senate, the negative was resolved in Mr. Doddridge's case; in Mr. Campbell's, the affirmative: in the other house I remember no precedent, though the case, to my knowledge, has often occurred.

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Some may attempt to obviate this last argument, by taking a distinction between offices under the *Constitution*, and under the *Commonwealth*; and though it be too subtle for the vision and grasp of my mind, yet, should it occur, it will be put to rest by considering that this principle of the Constitution is not restrained to offices of its own providing; that the clause itself recognises *all* lucrative offices; and that, though the profession of the law is, not mentioned by the Constitution, yet it depends on Courts of constitutional organization.

Again, by the Constitution of the *United States*, art. 1. s. 6. cl. 2. "No person holding any office under the *United States* shall be a member of either house *during his continuance in office*." Is it, or has it ever been, thought that hereby the bar of the Federal Courts are excluded from Congress?

One instance more. By the act of 1788, *New Rev. Code*, p. 40. "The members of the Congress of the *United States*, and all persons who shall hold any legislative, executive, or judicial office, or other lucrative office whatsoever, under the authority of the *United States*, shall be ineligible to, and incapable of holding, any seat in either house of the General Assembly, or any legislative, executive, or judicial office, or other lucrative office whatsoever, under the government of this Commonwealth." And by the act of 1799, *ib.* p. 392. "No person holding or occupying *any office or place*, or any commission or APPOINTMENT whatsoever, civil or military, under the authority of the *United States*, whether any pay or emolument be attached to such office, place, commission or appointment, or otherwise, or accepting or receiving any emolument whatsoever from the *United States*, shall be capable of being elected to, or holding any office, legislative, executive, or judicial, or any other office, place, or appointment of trust or profit, under the government of this Commonwealth."

Now, if lawyers in the STATE Courts are officers or placement



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under the Commonwealth, lawyers in the *Federal* Courts are so under the *United States*, and are, by the statutes just recited, excluded, not only from all political and military state offices, but from the state bar also. If I am to be excluded from this bar for refusing this test, the gentlemen of the federal bar must be disbarred in the State Courts. Yet it was never imagined; even the keen-sighted jealousy which produced these laws never imagined, that such a conclusion could grow out of them. The objection has eluded the sagacity of all our statesmen, lawyers, judges; of all concerned in devising, making, executing those laws. In fine, it never occurred as a possible opinion, that lawyers of the state or federal bar are officers under the state or federal government; otherwise, doubtless, the exception made by those laws, in favour of county justices and militia officers, would have been extended to them.

We must suppose the legislature acquainted with the terms, principles, and spirit of our laws; with the *English* legal language and doctrine, the basis of our own; much more with our particular institutions, and with the universal practical construction of them; that when it uses particular language, it uses it in the sense affixed to it, by the *English* jurists, by the state and national constitutions, by former laws, by constant practice under them all, and by the universal understanding of the public in previous cases, all concurring.

Mr. Leigh knew of only two objections to his argument, which had been deduced from our own laws and usages. One was, that, under a *general* provision that all *officers of government* shall take the oath of allegiance, the members of the bar, state and federal, have been always held bound to take that oath; that is, they have been held to be *officers under government*. But this objection, Mr. Leigh shewed, was founded on a plain mistake in point of fact: it was not from any such reasoning or inference, but from positive and express provision, that the profession had been required to take the oath of allegiance to the state or to the union. *Rev. Code*, p. 55. 96. *Laws U. S. cong.* 1. sess. 1. c. 30. s. 35. p. 74. 2 *Dal.* 399. Yet he had been *well informed*, that this was the *chief*, if not the *sole* ground of the opinion of those most respectable Judges of the General Court, who, conferring on this subject in *June* last, hastily concluded that the profession was within the 3d section of the act to suppress duelling. So

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true it must for ever prove that the laws of nature, as *unlike* as they are *above* those of man, tolerate no exceptions; and that the most enlightened minds are not exempt from that liability to error ordained of all that is human. Another objection was, that the act of 1792, c. 71. s. 2. directs that counsel and attorneys "shall take an *oath of office*," namely, "I do solemnly swear, that I will honestly demean myself in the practice of the law, as counsel or attorney, and will in all respects execute my *office* according to the best of my knowledge and abilities." This objection, Mr. Leigh thought, hardly needed an answer. It begged the whole question in debate. The lawyer swears he will execute his office: What office? The practice of the law. And this brought it back to the first point; the *nature* of that office. *Office* there meant no more than *duty*. An office had been defined to be a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging; whether public, as that of magistrate; or private, as of bailiff, receiver, or the like. 2 *Bl. Com.* 36. I admit, said Mr. Leigh, that in a large sense, an attorney at law is an officer; so is an attorney in fact, an administrator, a physician, and who not? In the largest sense, every *duty* is an office. Thus, the finest treatise of ancient philosophy, that has been saved from the beautiful and admired ruins of antiquity, is called by its author and his countrymen, *Cicero de officiis*; by us, *Tully's offices*. The question here is not whether the practice of the law be an *office*, but whether it be (as the chief justice says, 5 *Mod.* 432.) a *public* office or not? I know no better criterion of a *public* office, than that mentioned by counsel in *Carth.* 478. "that it is a rule, that where one man has to do with another man's affairs against his will, and without his leave, that is an office, and he who is in it an officer:" to which I beg leave to add, that to every *public* office belong duties to which the officer or his servants only are competent, and to which he is compellable. But an attorney or counsellor in *Virginia* may or may not be employed, may or may not engage his services, at the public or his own pleasure. Try it by another test: "It may be said once for all," says Sir *Edward Coke*, "nonuser of itself, without some special damage, is no forfeiture of private offices; but nonuser of *public* offices which concern the administration of justice, or the Commonwealth, is of itself a cause of forfeiture." *Co. Litt.* 283. a. Now as, certainly, nonuser is no forfeiture of the office of a lawyer, it is not a *public* office concerning the admini-

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nistration of justice, or the Commonwealth. And Comyns, in enumerating the officers of the Courts of King's Bench and Common Pleas, pretermits the profession altogether. 3 Com. Dig. 279. 1 *Ibid.* 598.

But even though the practice of the law were an office or place under the Commonwealth, within the meaning of this act; Mr. Leigh said, he was not bound to take the oath, which those officers only were to take, *who should be appointed after the passing of the act*. He could conceive no other appointment of a lawyer in this country (what other was there?) than the license. His license was of eight years' standing. His case, therefore, was not within the words or spirit of the act. And the Legislature would have had good reason to make such a difference. A young man had a fair and free election to take or to forego the profession with its conditions; other and open roads to fame and fortune lay before him: while one whose destiny in life was fixed had no such freedom of choice, and ought not to be thus required, *ex post facto*, to subscribe new terms, or abandon his only means of earning a livelihood.

Of the doubt as to the constitutionality of this law, that had been suggested from the bench, (by Roane, J.) Mr. Leigh said, the more he had pondered it, the deeper impression it had made on his mind. Our Constitution (art. 14.) provided that certain "officers (Judges, Attorney-General and Secretary) shall have fixed and adequate salaries; and, together with all others holding lucrative offices, and all members of the gospel of every denomination, be incapable of being elected members of either house of assembly or the privy council." Now these being the only constitutional disqualifications, the strong implication was, that there should be no other. And there would be no doubt of it, but for another provision of the Constitution; "that delegates and senators shall be chosen of such men as actually reside in, and are freeholders of the county or district, or *duly qualified according to law*." Art. 5, 6. As to which Mr. Leigh remarked, that these very words were plainly meant to fix a qualification; otherwise, the whole passage had as well been omitted, and the subject left entirely to legislative discretion; whence the phrase *or duly qualified according to law*, must refer to some pre-existent, or coeval, not future laws. Then, as he conceived, that phrase stands opposed merely to *freeholders*; so as to restrain the power

of change, if any was intended, to that point only. Mr. Leigh had been informed, as matter of history, and he believed, that those alternative words referred to certain sections of the Commonwealth, the citizens of which had, at the time, no freehold titles in their lands, or at least imperfect ones, and yet *were duly qualified by law* to elect and be elected.<sup>(a)</sup> But if the words of

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the Constitution were doubtful, its spirit could not be mistaken. If the Legislature might add one new disqualification, they might add many; multiply disabilities without end; disqualify whole districts or classes of men by personal or local description; make an academical degree, or even a previous service in one of its own bodies, a necessary qualification; and thus convert the government into an oligarchy. If this tremendous power existed at all, it was boundless and uncontrollable as the winds; and dissipated at once all our fond notions of a written constitution, late the glory of American politics. These test laws, particularly, were the first weapons young oppression would learn to handle; weapons the more odious, since, though barbed and poisoned, neither strength nor courage was requisite to wield them. Should we rely on public virtue to keep us from the use and extension of this system of tests? In no age, nor clime, nor nation, had ever virtue wholly swayed human bosoms and actions; man was universally liable to be transported with passion, blinded with folly, corrupted with vice, and yet more with power, maddened with faction, and fired with the lust of domination; let us not flatter ourselves *we* were not exempt from the common lot, and although the wise exposition of the bill of rights, by the act to establish religious freedom, might for a time secure us from a *religious* test, a *political* one was certainly a possible, perhaps a probable, and not very remote event. Sir, said Mr. Leigh, I am possessed with a strange delusion, if *the very law in question* does not appoint a political test. I fear other instances might be recounted. Such are the BEGINNINGS. The END of all these things is death. A free constitution cannot coexist with this dangerous and parricidal power in the hands of the ordinary Legislature. I recur, therefore, to the fundamental principle of the revolution, which I take to be *obsta principiis*, and directly submit the constitutionality of this law to the judgment of the Court.

(a.) See ordinances of convention, 1775, ch. 4 s. 12, *Chans. Rev.* p. 31. which seems to put the truth of this fact out of doubt.

It had been plausibly suggested, that it cannot be unconstitutional to require one to abjure the commission of a crime. Mr.

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*Leigh* pursued this doctrine to its consequences; if true on a small scale, it was so on a large one. If it were a constitutional qualification to require of officers that they shall abjure duelling, so cheap a system of preventive justice might be extended beyond those persons, and that crime, to all persons, and to every crime and vice of the decalogue; not to reckon new ones, which legislative ingenuity might create, or (alluding to the 6th section of the act under discussion) *appropriate from our sister states*. What then? Would the sin original of man's fall, which the redeemer's blood hath not blotted out, fade and vanish before this poor earth-born scheme of salvation? Or would crimes and vices, spite of this oath, still continue to infest the world? Then, said he, the only effect of this blessed system of abjuration would be, to heap on the head of every sinner the adventitious guilt of perjury; to forge racks for the conscience, and tortures for the soul. Can such horrid refinement of tyranny be constitutional? If not against the WORD, is it not against the SPIRIT, which declares, "that cruel and unusual punishments ought not to be inflicted?" Surely the pains directly denounced against the duellist, disfranchisement, excommunication and death, (for exile is denied,) are severe enough; and in regard to a professed pious motive of this law, *religious* men, I think, might have been content with punishing the body, without impiously preparing the damnation of the soul.

Because I would not lightly run the slightest risk of abjuring the right of self-preservation, under the vague words of this law; because I disapprove its policy; because I think the Court has no rightful power to force me within its pale; because I hold it to be at war, *at least, with the spirit of the Constitution*; withal, because I abhor rash oaths of all sorts, I do utterly loath the taking of this oath, and feel myself bound by my honour as a gentleman, and my duty as a citizen, to resist the imposition of it to the uttermost of my power. With the light of history before my eyes, I have not the vanity to think that my mind and actions, any more than other men's, are proof against force or temptation; and for that reason only, I forbear to say, positively, that I never will take this oath as a forensic qualification. I am speaking of it more particularly in that view. The application of this test, in principle and in consequence, to offices which are of public gift

and trust, is widely different from such application to professions which are matters of right and modes of livelihood.

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*Monday, November 26.* The Judges pronounced their opinions.

Judge TUCKER. On a former day of this term, Mr. Leigh, a gentleman who has practised as an attorney and counsel for several years in the District Courts, County Courts, and Court of Chancery, made a motion to be permitted to practise in this Court; a question was propounded, whether he must take the oath prescribed by the act of the last session for the suppression of duelling. I was of opinion that he could not be permitted to practise in this Court without taking that oath. My opinion was founded upon these principles: that an attorney at law is a *public officer*; that his license is only an inchoate step to office; that he becomes an officer in that Court *only* in which he qualifies as the law directs; that his admission to practise in *one* Court does not authorize him to practise in any *other* Court, without the permission of such other Court, and taking the same oaths therein as if he had never been permitted to practise in *any other*; that such an admission was equivalent to an *appointment*, inasmuch as he thereby *becomes an officer* of that particular Court: that the policy of the act for suppressing duelling extended as well to *such officers*, as to any *other officer* under this Commonwealth.

I have attended to the arguments which have been since offered by Mr. Leigh, in opposition to that opinion, and have examined such of the authorities cited by him as I could get access to. *Hurst's case*, Raym. 56. 94. which is the same case as in 1 Lev. 75. 1 Sid. 94. 1 Keb. 349. 354. 387. 558. 675., not to mention the authority of Judge Blackstone, 3 Comm. 26. clearly proves, that in *England* an attorney at law is considered as a *public officer*; otherwise a *mandamus* would not lie to restore him. The whole context of our act concerning counsel and attorneys at law, between whom there is no distinction in this country, proves the same thing to my apprehension. They are subject to penalties to which no *private* citizen could possibly be subjected. Let a single example suffice: the lawyers practising in the Inferior Courts may demand for an *opinion* or *advice*, where *no suit* is brought, or prosecuted or defended by the attorney giving such

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advice, but not otherwise, one dollar and sixty-seven cents; those in the General Court three dollars and fifty-eight cents, for advice, under the same restrictions. And every lawyer, exacting, taking, receiving or demanding any greater fee, or other reward, is subjected to a heavy penalty. Under what colour or pretext could the Legislature impose a penalty on any other than a *public officer*, for demanding and receiving a hundred or a thousand dollars, or any other sum whatever, for giving his *advice* to any person willing to pay for it?

If, then, the office of an attorney or counsel at law be a *public office*, it must be an *office or place under the Commonwealth*; which brings it within the words of the act. It matters not by whom the appointment may be conferred, or in what manner the investiture is made: whether the Legislature, the Executive, or the Court *appoints or admits* to an *office*, the *office or place* is held or exercised under the authority of the Commonwealth.

On the point of unconstitutionality, I never have doubted, nor ever shall controvert, the power of this Court to consider and decide whether any act of the Legislature be contrary to the Constitution of the State, or of the *United States*, or otherwise. My reasons and opinions on this subject have long been before the public. I shall not, therefore, repeat them. But on the present occasion, I have not felt, nor do I feel, the smallest doubt of the constitutionality of the act in question; the object of which appears to me the prevention of a great moral and growing evil; and the provisions of it, so far as I have had occasion to consider them, well calculated to advance the benefit of society, and suppress the evil.

I therefore feel no reason to depart from the opinion which I first delivered, that the oath prescribed by that act must be taken by every gentleman who may wish to practise in this Court, previous to his admission.

Judge ROANE. I had seen cause to doubt of the correctness of the sudden and off-hand opinion given in this case, *long before* I had heard Mr. *Leigh's* argument. That opinion was formed and delivered upon an *insulated* view of the subject, and under circumstances which precluded a due consideration of the question. I shall ever deem it more honourable, as it is, undoubtedly, more useful, to retract than to adhere to a hasty or incorrect opinion.

An attorney is defined to be one who is set in the place of another, and he is either *public*, as an attorney at law, or *private*, as being delegated to act for another, in private contracts or agreements. (1 *Bac.* 287. *Co. Litt.* 52.) With respect to these public attorneys, or attorneys at law, in order to ensure a due degree of probity and knowledge in their profession, so indispensable to persons acting in that character, none are *permitted* to act as such but those who are allowed by the Judges to be skilled in the law, and certified by the Court of the County of their residence to be persons of honesty, probity and good demeanour. As a further guard against improper practices in their profession, they are required to take the oath prescribed by the act upon this subject. But for the injury arising to the public in general from the want of skill in the profession, and the danger of abuses on the part of persons whose profession peculiarly enables them thereto, no legislative interference would be necessary to distinguish these public attorneys from the private attorneys before mentioned; nor, on any other ground, would it be just to abridge the general right of our citizens to employ any person whatsoever, as their attorney, at their pleasure. Having obtained the sanction of these two tribunals, touching these two particulars, an attorney is *licensed* or *allowed* to practise; and the Courts have also a continuing control over them, with power to revoke their licenses for unworthy practices or behaviour: But the licensing Judges cannot be said to "elect" or "appoint" an attorney: He can, perhaps, only be said to be "appointed" by the particular clients, who, after he is licensed, may severally employ him. This result is entirely justified by a view of the act "concerning attorneys at law and counsel," 1 *Rev. Code*, 96. in which these functionaries are nowhere said to be "elected" or "appointed," either by the government or the licensing Judges, nor are their functions anywhere called or designated as "offices" in the act, except in the form of the oath prescribed to be taken; and even there, that term may well be taken in a general and extended sense, as synonymous with "duty." The act, it is true, prescribes an *oath* to be taken as aforesaid, previous to being allowed to practise; but that can only be considered, as I have before said, as an *additional* security for the good conduct of the attorney: It would be too much to say, that this single circumstance of precaution (any more than those of the license and certificate of the County Court

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before mentioned) shall *exalt* that functionary into an "officer," when he is neither said in the law to be "appointed" to any office, nor to *hold* any office, and when he receives no salary or emolument, except the fees which individual citizens may please to give him. If this single circumstance should be construed to have that effect, it might be equally argued to have a similar effect, in relation to *jurors*, or others who are obliged to incur the obligation of a similar sanction, before they are permitted to officiate.

It is not necessary, in this case, to consider whether, and in what degree attorneys are considered in this country (as they are in *England*) officers of their respective Courts; though it is easy to see that an attorney, in this country, not having as many *privileges* as the *English* attorneys, in consideration of which, that character is there holden to attach, a difference may probably exist in this country, in this particular; nor is it necessary to consider the operation of the act, as relative to the Attorney-General and his *deputies*, and other attorneys for the Commonwealth, who are all "elected" and "appointed" to their several offices, and receive an annual salary for their services. Even admitting, therefore, that attorneys are, in some sense, and in some degree, officers of their several Courts, as they are held to be in *England*, the question still recurs, are they officers within the meaning of the act to suppress duelling?

However laudable the object of the act to suppress duelling may be, it is still a highly *penal* law, and must be construed strictly. It is unusually penal, if not tyrannical, in compelling a person to stipulate upon oath, by the 3d section, not only in relation to his past conduct, and present resolution, but also for the future state of his mind, and his future conduct, with respect to the offence in question, under all possible circumstances; a stipulation which many conscientious persons, however prepared to take the oath as it regards the time present, might well hesitate to enter into. Thus premising that this act is highly and unusually penal, I will, under the influence of the rules for construing penal statutes, proceed to apply it to the case *before* us.

In making a construction upon this act, we must have an eye to every part of it; we must particularly have reference to the 2d section as well as the 3d; they both relate to precisely the *same* offence, (the giving or accepting a challenge,) and go to the dis-

ability of the *same* persons only. They differ only in this, that the last clause goes beyond the former, in requiring a pledge that the persons therein contemplated will never, *in future*, be engaged in duelling.

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The 2d section declares that a person accepting a challenge, &c. "shall be incapable of *holding* or being '*elected*' to any post of profit, trust, or emolument, civil or military, *under the government of this Commonwealth.*" It relates as well to persons *now* in office, as to those *to be elected* thereto, and we are to construe those of the former class, designated under the term "*holding*," as standing on a common foundation with the latter, *i. e.* that the former must have been *elected* as well as the latter must, of necessity, be *elected*. This part of the clause, in both its branches, excludes attorneys at law, who, I have endeavoured to shew, are neither "*elected*" nor "*appointed*" to office, but are merely *permitted* to practise, by those who are constituted by law judges of their character and qualifications respectively. Again, this clause only extends to those who hold "a post of profit, of trust or emolument, civil or military, *under the government of this Commonwealth.*" Admitting (which is the most that can be granted) that attorneys are to be considered as "*officers*," they are only considered, even in *England*, as I have before said, as officers of *their respective Courts*. (1 *Bac.* 287.) They do not, therefore, come up to the *desideratum* of this act; they are not officers *under the government of the Commonwealth*. 'There is no just ground on which we can erect, by implication or construction, into *governmental* officers, those who, in *England*, are not exalted to that character, and who, in the only books and doctrines handed to us on the subject from that country, are held, at most, to be mere subordinate officers of *their respective Courts*. But, if attorneys could be even considered as officers of the government, they do not hold an office of *profit* or *emolument* under the government; (or, in other words, a *lucrative office*;) otherwise they would have been excluded from a seat in the Legislature by the provisions of the Constitution; which has never been done nor attempted in relation to mere attorneys, however it may be as to those who are "*appointed*" to prosecute for the Commonwealth, and receive a salary therefor. This section, therefore, relating only to persons "*elected*" to office, which attorneys are not; to persons who are officers *under the government of the Commonwealth*, in which

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predicament attorneys do not stand; or to persons holding lucrative offices, which has never been considered as being the situation of mere attorneys at law, however gainful their practice may be, does not extend to persons of that character.

The phraseology of the 3d section varies somewhat from that of the 2d; but it is only a variation in *words*, not in *substance*. The office or place which it contemplates is one which equally requires an "appointment;" and is to be an office or place "*under the Commonwealth*," and not under an individual Court of Justice. These *criteria* exclude attorneys at law, as completely as those contained in the former clause under a varied form of expression. In addition to this, the words of the oath itself prescribed by this clause, "during my continuance in office," seem to indicate those public offices which are held by commission, or appointment, and are wont and proper to be *resigned*; they do not naturally apply to a function which is never resigned or formally given up, which it is the right of one citizen to exercise at the request and for the benefit of another, and in respect to which the *regulating* hand of the Legislature has only interposed, for the salutary purposes before mentioned.

This construction of the duelling act, in this particular, is both supported, as aforesaid, by the cotemporaneous and continued construction by both houses of Assembly, admitting attorneys to a seat in the Legislature, notwithstanding the provisions of the 14th section of the Constitution excluding therefrom those who hold lucrative offices; and by the construction upon the act of *December, 1778, c. 37. (1 Rev. Code, p. 40.)* and that of *January, 1799, (1 Rev. Code, p. 392.)* disabling certain officers of the general government from holding offices under the government of this Commonwealth. By the last of those acts, it is enacted, that all persons holding or accepting "any office or *place*, or any commission or appointment *whatsoever*, civil or military, under the authority of the *United States*, whether any pay or emolument be attached thereto, or not" shall be "incapable of being elected to, or of holding any office, legislative, executive or judicial, or any other *office, place, or appointment* of trust or profit, under the government of this Commonwealth." Although these words are undoubtedly as extensive as those occurring in the duelling law now before us, it has never been pretended (although, if attorneys when they practise in the

State Courts thereby become officers of the Commonwealth, they equally become officers of the general government when they practise in the Federal Courts) that the attorneys practising in the latter Courts cannot also practise in the former. On the contrary, the sanction of *this* Court, as well as of all the other Courts in the Commonwealth, has been given to this permission; and thus, a construction has been *universal*, in this country, in cases entirely analogous to the one before us; which, as well as those mentioned by Mr. *Leigh*, upon analogous cases in *England*, completely settles the present question. My opinion, therefore, is, that a mere attorney at law, or counsel, is under no obligation to take the oath in question previous to his being admitted to practise in the Courts of this Commonwealth.

As to the question of the constitutionality of the act to suppress duelling, the foregoing view of the case renders it unnecessary for me to say any thing upon it. I do not see, however, at present, that it can be deemed unconstitutional, as it relates to the qualification of attorneys at law, or counsel; unless, indeed, it be on the broad ground of the injustice, if not tyranny, of compelling a man to swear, *in advance*, that he will not for a given time do or forbear to do any given act; a thing which tender and scrupulous consciences, however resolved at present, might well hesitate to do. With respect to any questions which may arise upon this act in future, in relation to persons elected into the Legislature or the privy council, touching the power of the Legislature to abridge and circumscribe the number of those from whom the people have reserved to themselves the right to make their elections into those important stations; they will remain to be decided by the proper tribunals when they occur, upon full and solemn deliberation; whether the act before us falls within this description, and whether it be censurable, or not, on the ground of abridging the just and constitutional rights of the *people*, through the medium of an agent, who *as yet* has committed no offence whatsoever, when, undoubtedly, the Legislature only meant to impose a penalty upon the offender *himself*; will be *then* to be considered and decided. At present I am very far from having any conclusive opinion upon it.

Judge FLEMING. The act under consideration being a compulsory law, (however salutary it may be,) imposing on the officers

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of government an oath unknown to the former laws of the state, or of the *United States*, although there be no pecuniary penalty inflicted on those who refuse to take the oath therein prescribed, I cannot but consider it as a penal statute, and, as *such*, must give it a strict interpretation. It appears to me, therefore, that *practitioners* of the law are not comprehended in the act, under these words; "every person who shall be appointed to any office or place, civil or military, under the Commonwealth, shall, in addition to the oath now prescribed by law, take the following oath," &c. The *practice* of the law is a *profession* which every citizen of the State, having complied with certain requisites of the act of 1792, c. 71. may take up, engage in, and exercise, according to his own will and pleasure; and which he may lay down, and resume, as often as to him may seem convenient, without any responsibility for his conduct in so doing. The language or wording of the latter sentence in the oath, evinces, to my mind, that the *practitioners* of the law were not in the contemplation of the Legislature. The *officer* taking the oath, after swearing "that he hath not been engaged in a duel, by sending or accepting a challenge to fight a duel, or by fighting a duel, or in any other manner in violation of the act, since the passage thereof," is further to swear, that "*he will not be so concerned, directly or indirectly, in such duel, during his continuance in office;*" which, in my conception, has no allusion to *practitioners* of the law: but, admitting they are comprehended in the act, it has, or ought to have, a prospective, and not a retrospective, operation; and cannot affect officers of *any description*, appointed to office *prior to the passage of that act*; which I construe as if the phraseology of the clause had been thus; "every person, who, after the passing of this act, shall be *appointed* to any office, civil or military, under this Commonwealth, shall take the oath, &c. as therein prescribed." And I cannot conceive that a *practitioner* of the law of nine or ten years' standing, qualifying to exercise his *profession* in a Court where he had been unused to practise, can be an *appointment* to an "*office, civil or military, under the Commonwealth.*" I am, therefore, of opinion, that Mr. Leigh may be admitted to practise at this bar, without taking the oath prescribed by the act to suppress duelling.

Mr. Leigh was therefore admitted without taking the oath.

Austin's Administratrix against Whitlock's Executors.

Saturday,  
October 27.

THIS was an action of covenant, brought in the County Court of *Hanover*, by *Betsey Austin*, administratrix of *Chapman Austin*, deceased, against *Martha Whitlock*, executrix, and *John A. Richardson*, executor, of *David Whitlock*, deceased.

The declaration set forth that the said *David*, in his life-time, on the 22d day of *February*, 1791, by his certain writing obligatory sealed with his seal, &c. obliged himself to convey unto the said *Chapman Austin*, all the interest of him the said *David* in a certain suit brought by him against one *John Smith* in consequence of his the said *Smith's* undertaking to become one *Giles Carter's* security for the purchase of a tract of land sold by him the said *David* to the said *Carter*, lying in the County of *Halifax*; and in case the said *John Smith* should not be legally bound by his said undertaking, he the said *David* in that case obliged himself by his said writing obligatory to convey unto the said *Austin*, the right which had been conveyed to him the said *David*, by a certain *John Garland* of whom he bought the said land, for and in consideration of a sorrel horse delivered to the said *David* by him the said *Austin*, the same day and year aforesaid. The breach assigned was, that the said *David*, in his life-time, had not, nor had the defendants, since his death, although often requested, conveyed to him the said *Austin*, in his life-time, or to the plaintiff, since his death, all the interest of him the said *David* in the said suit, nor had he or they conveyed to him the said *Austin* the right which was conveyed to him the said *David* by the said *John Garland*, of whom he the said *David* bought the said land as aforesaid, "the one or other of which he the said *David*, in his life-time, and the defendants, since his death, ought to have done, according to the form and effect of his said writing obligatory."

The defendants, without craving oyer, pleaded "conditions performed," and, issue being joined, the plaintiff, at the trial, offered in evidence a writing corresponding with that described in the declaration, except that it concluded, "as witness my hand this 22d day of *February*, 1791," and was signed, "D. WHITLOCK," with a written scroll annexed to the signature: but as it was not expressed on the face of the said writing, that that scroll

1. A scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appear, from some expression in the body of the instrument that it was intended as such.

2. In covenant, on an agreement to convey the party's interest in a certain suit, and (in case the defendant in that suit was not legally bound by his undertaking) then to convey the right of such party to certain land, a declaration charging a refusal to convey the interest in the suit, or the right to the land, without setting forth a failure to recover in the suit, and a subsequent refusal to convey the land, is substantially defective, and not to be cured by a general verdict, assessing entire damages.

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was acknowledged by *David Whitlock* as his seal, and it was not evidenced, *as such*, by the attesting witness, who was dead, (though his hand-writing was admitted,) the defendants moved the court that the said writing should not go in evidence to the Jury; which motion being overruled, a bill of exceptions was filed. The Jury found a verdict for the plaintiff for 790 dollars damages; and judgment was accordingly entered; but, on an appeal to the District Court holden at *Richmond*, was reversed; and judgment entered for the defendant; whereupon the plaintiff appealed to this Court.

*Peyton Randolph*, for the appellant. The County Court decided correctly in receiving the writing in question as a *sealed instrument*; a *scroll* being sufficient by virtue of the act of 1789.(a) In the case of *Baird v. Blagrove*, 1 *Wash.* 170. (which seems against me,) the agreement was dated before the law giving scrolls the same validity as seals, and *Jones & Temple v. Logwood*, 1 *Wash.* 42. is an authority in my favour; for it does not appear that in that case the words, "in testimony whereof I have affixed my *seal*," &c. were inserted in the body of the instrument; yet the scroll was decided to be sufficient.

(a) 1 Rev.  
Code, p. 115.  
s. 26.

*Wickham*, contra. I admit that, where a party affixes a scroll *by way of seal*, it is good as such *at common law*: for the act of Assembly was only in affirmance of the common law. But here there is *no* proof that the scroll was *intended* as a seal.

But, putting this objection out of the question, no action can be maintained at law on this paper. The covenant is void, as being impossible; and, if it were possible, is against law. One man cannot convey to another his interest in a *suit*. A *chose in action*, at common law, is not assignable. The *suit itself* cannot pass by a conveyance. If this be not the construction of the contract, but it is to be understood merely as an agreement that *Chapman Austin* should have the *benefit* of the suit, this writing was sufficient of *itself*, and there was *no breach*.

The covenant is also against law: for, if not *champerty*, the first part was certainly *maintenance*, and the second, or alternative part, was in violation of the act against conveying or taking *pretended titles*; (b) there being no averment in the declaration that *Whitlock*, who covenanted to convey, was in *possession* of the land.

(b) 1 Rev.  
Code, s. 30.  
p. 37.

Indeed, the contrary is to be inferred from the agreement; and such an agreement is not binding in law or equity.

2. The declaration is radically defective; containing no averment that *Austin* lost the benefit of the suit, (in which event only the land was to be conveyed,) and setting forth, in fact, no cause of action.(a)

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(a) *Chichester v. Vass*, 1  
Call, 83.

*Randolph*, in reply. If a scroll is a seal, *per se*, it must be so, though not described as such.

As to Mr. *Wickham's* objections to the right of action; I admit that a conveyance of an interest in suit is not binding at law, though it is in equity: but if a party covenants to do an act which is not immoral, he is bound to do it, whether it be effectual in law or not. The most that could be said against the covenant to convey the obligor's interest in the suit is, that it would be *unavailing*; and this is not a sufficient objection; for parties, if they please, may attach importance to a thing nugatory in itself. But, properly construed, it signifies no more than giving the benefit of the judgment when it should be obtained. That part of the agreement was therefore not void: but, if it were, the *alternative* part was good; and that is enough.(b) The cases relative to *maintenance* are not applicable, in all respects, to this country.(c) If we take only so much of the doctrine as is reasonable, this agreement does not come within its reason or policy. Neither does the statute relative to *pretenced* titles apply. In 15 *Viner*, 154. it is said that a title is *pretenced* "where it is founded in *pretence*, and nothing in verity; or where a good title is made *pretenced* by the act of the party." Under neither of these heads can this case come; for it does not appear that *Whitlock's* title was *unsound*; and it cannot be contended that an *equity* in lands is not assignable. It does not appear from the agreement, or any other circumstance, that he was out of possession.

(b) 5 *Vin.* 112.  
(c) 15 *Vin.* 152. (E.) pl. 4.

2. The breach was sufficiently assigned in the declaration; being in the words of the agreement.(d) *Chichester v. Vass* is not like this case; for, there, the *gist* of the action was altogether omitted. But if there was any error, it was cured by verdict. The defendants pleaded "*conditions performed*." This was an admission that the conditions were *possible*, and an averment that they *had been performed*.

(d) 6 *Vin.* 445.



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*Wickham.* If matter of *substance* be omitted in a declaration, it is not cured by verdict. There was no option to receive the land in lieu of the suit, in any other event than the failure of the suit. It was essential, therefore, to state that circumstance. The declaration only says that *Whitlock* failed to convey the benefit of the suit, or to convey the land; thus assigning two breaches; the first of which was impossible, for the agreement itself was all the conveyance he could make of the suit; the second was assigned altogether uncertainly and defectively; and the damages assessed are entire.

*Randolph.* It is evident that *Austin* expected, and was entitled to some other conveyance of *Whitlock's* interest in the suit; the failure to execute which was a sufficient breach of the agreement.

Saturday, Nov. 16. The Judges pronounced their opinions.

Judge TUCKER, after stating the case. That a covenant is a deed, and that a seal is one of the essential parts of a deed, is evident from the authorities generally, and especially *Co. Litt.* 6. a. 35. b. 175. b. 225. a. and b. 229. b., and *Litt.* a. 371, 372. From several of which, and particularly the two last, it is apparent that the clause of *in cujus rei testimonium* ought to recite that the maker of the deed hath thereunto put his seal: for, otherwise, a supposititious seal may be affixed to any instrument of writing, without proof of the acknowledgment thereof by the maker of the instrument, and a mere parol promise or agreement may be converted into a covenant, which is an instrument of a much higher nature; insomuch, that what might be considered as mere *nudum pactum*, as in the case of *Hite, Ex'r of Smith, v. Fielding Lewis's Ex'rs*, in this Court, October 29, 1804, (MS.) may, by the subsequent addition of a seal or scroll, be converted into an obligation which should not only bind the maker and his executors, but his heirs also. For such would have been the effect of the writing signed by *Fielding Lewis*, in that case, "whereby he obliged himself, his heirs, executors and administrators to indemnify Mrs. *Smith*," as executrix of *Charles Smith*, for the latter having become security for his son, if there had been a seal, or scroll, added to that instrument, and acknowledged by the maker, in the clause of attestation. But if such mention be unnecessary in the body of the instrument, how easily may any in-

instrument of the same kind be converted into one very different from it? The omission of the word "*seal*" in the clause of attestation, according to the maxim of law, "*expressum facit cessare tacitum*," does, in my opinion, preclude all evidence, *dehors* the instrument, of the execution of it in any *other* manner than is expressed in the body of the instrument. One of the reasons which are given why a deed must be pleaded with a *profert in curia* is, that the deed must be brought into Court for the purpose of inspection; and if (as is said in 10 Co. 92. b.) the Judges found that it had been *raised* or *interlined* in any *material* part, they adjudged it to be void. Now, suppose the word *SEAL* had been found interlined in such an instrument as this, and no notice taken by the witnesses that such an interlineation had been made before the execution thereof, and nothing farther said about the *seal*; would not this have avoided the deed? I presume it would. So deeds, in which were erasures, have been held void, because they appeared, on the face of them, to be *suspicious*. (a). Now what can be more suspicious than the apparent addition of a *seal* to an instrument, which the maker acknowledges under his *hand ONLY*? Judge Buller, in the case of *Master v. Miller*, 4 Term Rep. 339. speaking on this subject, says, "when there is a *profert* of a deed, the deed or the *profert* must agree with that stated in the declaration, or the plaintiff fails. But the *profert* of a deed *without* a seal will not support the allegation of a deed *with* a seal." Neither, as I conceive, will the *profert* of an instrument, importing, in the body of it, to be executed under the *hand of the party ONLY*, support the allegation of a deed *sealed* with the *seal of the party*, although a seal be to that instrument in reality affixed; inasmuch as that may be done without the party's knowledge or intention.

But here an objection arises upon the pleading. It may be said, the defendants have, by their plea of "*covenants performed*," admitted the execution of the covenant set forth in the declaration. This is certainly correct: but, inasmuch as *oyer* was not asked of that covenant, it cannot be alleged that *this identical* instrument is the deed declared upon, and *admitted* by the plea. Every objection to the instrument on the ground of *variance* between the deed alleged in the declaration, and that which was offered in evidence, appears to me to have been still open to the defendant. I am, therefore, of opinion, that the judgment of the District Court was correct, and ought to be affirmed.

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tit. FACTS,  
pl. 11 cited  
& Term Rep.  
323.

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170.

Judge ROANE. As to the objection made to the reception of the writing in evidence in support of the action, I think the impression of the Court in the case of *Baird v. Blagrove*,<sup>(a)</sup> is equally correct, and decisive in support of that objection. In this case, as in that, the paper is nowhere stated, in its body, to have been sealed; in this case, as in that, it is merely attested as simple contracts not under seal are; viz, "witness my hand," &c. and in this case, as in that, a CONSIDERATION is stated in the writing; which is a circumstance equally unusual, and unnecessary, in relation to specialties. The mere circumstance of scrolls being annexed was not in that case sufficient to exalt the instrument into a specialty; nor ought it in this; especially, as there is only a single scroll in this case, which possibly might have been inserted through inadvertence or accident; whereas there were three scrolls in that case, whence a more solemn and deliberate execution of the instrument may be agreed to be inferible. The County Court, therefore, erred in admitting this paper in evidence, and the judgment of the District Court reversing its judgment is correct. Were this the only error, the District Court ought only to have awarded a new trial, with directions not to admit that paper in evidence in future; whereas it has given final judgment in favour of the defendant: and this brings us to the sufficiency of the declaration.

That declaration states that the testator of the appellees obliged himself to convey all his interest in a certain lawsuit then pending against one *John Smith*, who was security for *Giles Carter*, "and in case he should not be legally bound by his said undertaking," then also to convey to said *Austin* his right to a tract of land; and the declaration assigns breaches in not conveying the interest in the lawsuit, nor the right to the land; without averring, at the same time, that the said *John Smith* "was not legally bound" by his undertaking, which is a condition precedent to his being bound by the last covenant. The plaintiff has therefore charged, and recovered damages upon, a breach of a covenant, which is not shewn in his declaration to have occurred, but which, as set out, is inchoate and incomplete, for want of this last-mentioned circumstance.

It is clear that a breach should be so set out as that it may clearly appear to be within the covenant; and, also, that, where a covenant is in the alternative, the breach should be assigned as

to both parts thereof. This doctrine is found in 1 *Esp. N. P.* 363—366. and is decisive against the sufficiency of the present declaration.

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On this ground, then, (without entering into the other points stated in the argument,) I am of opinion to affirm the judgment of the District Court.

Judge FLEMING was of opinion, for the reasons stated by the other Judges, that the County Court erred in admitting the paper in evidence. He also concurred with Judge ROANE in pronouncing the declaration essentially defective.

Judgment of the District Court unanimously affirmed.

**Humphreys' Administrator against M'Clenachan's  
Administrator and Heirs.**

Monday,  
November 5.

UPON an appeal from the Superior Court of Chancery for the Staunton District.

*Alexander M'Clenachan*, on the 3d day of October, 1795, entered into an agreement with *Alexander Humphreys*, in the following words, under his hand and seal. "I have this day sold to *Alexander Humphreys*, his heirs and assigns, for value received, all and every emolument arising from two LAND-WARRANTS, one for 6,666 2-3 acres, issued to me, and in my name, and 4,000 issued to, and in the name of *William Long*, for services in the late army against *Great Britain*, as officers in the Continental and *Virginia State* lines, as per receipt of *R. G.*

1. If by a sealed instrument a vendor declare that he has sold to the vendee all his right to certain land warrants, for which the surveyor's receipt has been taken; that, if patents have issued in his name, he will transfer the same by deed; and, if not, desires that they

may issue to the vendee; agreeing to pay, or deduct from the purchase-money, all expenses which have accrued; he is bound to make a deduction for a deficiency resulting from a previous contract, by his agent, to allow the locator one third of the land; though such contract was not known to him at the time of his bargain with the vendee, to whom it was equally unknown.

2. On a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, (in whom the legal title remains,) claiming compensation for a deficiency, credits for payments and a conveyance; the Court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees to be by them conveyed to the heirs of the purchaser, (though not parties to the suit,) if the balance of the purchase-money be paid on or before a certain day; and if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs.

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*Anderson. All my right, title, interest, claim and demand, in and to the same, I hereby transfer to the said Alexander Humphreys. And IF PATENTS HAVE ISSUED in my name therefor, I will transfer the same by deed: IF NOT, I desire that patents or grants may issue to him the said A. H. for it; and all and every expenses that have accrued before this date, I will pay or deduct from the money due me for this land."* Neither price, nor the terms, or periods of payment are noticed in this agreement.

On the 21st of the same month, it appears by an exhibit in this cause, that *M'Clenachan* executed an instrument under his hand and seal, upon the back of a copy of survey filed in the register's office in *Kentucky*, in the following words: "I *Alexander M'Clenachan*, of *Staunton*, for and in consideration of *Henry Rhodes*' HAVING LOCATED the within lands, (the 6,666 2-3 tract,) do transfer unto him the said *H. R.*, and his heirs and assigns, one THIRD PART of the land contained in the within plat and certificate of survey, and desire a patent may issue in his name, for that part of the said tract." A patent issued on the 22d of *March*, 1797, to *M'Clenachan* and *Rhodes*, jointly, for the lands in the survey mentioned.

A letter from *Robert Breckenridge*, of *Kentucky*, dated *November 8*, 1795, and directed to *Alexander Humphreys*, mentions "that the writer had, a few days before, heard of his having purchased all *M'Clenachan's* land in that State, without regard to his previous engagements, and proceeds to inform him that the larger tract was located under his direction, at the particular request and solicitation of *M'Clenachan*; that, before the locator would undertake the business, he was obliged to engage, on the part of *M'Clenachan*, to secure to him one third part of the land: and suggests a wish that *Humphreys* would mention the matter to *M'Clenachan*, and that one third part of the tract there alluded to should not be taken into the accounts between them; or, if he received an assignment of the whole, that it might be upon condition of *Humphreys*' satisfying and paying the locator, according to his and *Breckenridge's* agreement. This letter appears to have been received by *Humphreys*, and some mention of it appears to have been made by him, in his life-time, to *M'Clenachan*. When he died does not appear.

After the death of *M'Clenachan*, which took place in *February*, 1798, *Humphreys* brought a bill in Chancery against his admi-

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nistrator and heirs, in which he states the price agreed on for the lands to have been three shillings per acre; that he was to pay 100*l.* in cash, and for the residue bonds were given; and that he *paid the money*, of which there is *no proof* in the record. He proceeds to state the assignment of one third of the larger tract to *Rhodes*; and that *he (Rhodes)* had obtained a patent for the whole, and is in full possession thereof: that, with respect to the 4,000 acres, *M'Clenachan* agreed to allow the locator *one third* part thereof, for locating; but the complainant had compounded with him for 12*l.* 10*s.* per thousand acres, which he expressly charges to be the lowest price; *the usual allowance being one third of the land itself*: that the administrators have brought suit on his bond, without allowing him any credit for the *deficiency in quantity*, and for money advanced for taxes and *expenses* thereon: and concludes with praying for a proportionate credit for one third part of the larger tract, to which the locator *Rhodes* had a title, and also for the sum agreed to be paid for locating the other tract of 4,000, amounting to 50*l.*; and for his other advances, &c.

*Humphreys* being dead, a bill of revivor and supplement was filed by his administrator, suggesting, among other things, that there was a valuable *Salt-spring* upon the land; praying an injunction to the judgments on *Humphreys'* bonds to *M'Clenachan*, and for a specific performance of the original contract, as far as it is in the power of the defendants so to do; with *ample compensation* for such part as cannot be performed.

The Chancellor, by his decree, allowed a credit *pro rata*, according to the *price*, for the one third of the larger tract, to which *Rhodes* was entitled for locating the same; and 12*l.* 10*s.* per thousand acres for the smaller tract; together with such other claims, for *payments*, as the complainant could make appear; and directed an account: and further that the defendants should convey all their title to the lands (and procure *Rhodes* to join therein, for whatever title he may have to more than one third part of the larger tract) to trustees for the following uses, to wit, that if the plaintiff, or the heirs of *Humphreys*, (who are not parties in this suit,) or some other person for them, should, on or before a certain day, pay to the administrator of *M'Clenachan* the balance of the purchase-money, (to be ascertained by the Commissioner's report,) with legal interest thereon, then the trustees to convey

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the legal estate to the heirs of *Humphreys*; otherwise, they were to sell as much of the lands as would be sufficient to pay the debt, and to convey the residue, if any, to the heirs of *Humphreys*.

From this decree the administrator of *Humphreys* appealed.

*Wickham*, for the appellant, contended, 1. That *Humphreys* was entitled to a deduction for the deficiency, in proportion to the value of the land, and not the price he was to give. He bought the whole land; and was not informed that the locator was to have part. It was a frequent practice for the locators to have compensation in money: there was no reason then for him to think that *Rhodes*, the locator in this instance, was to have part of the land. *M'Clenachan's* assignment to *Rhodes* was after the agreement with *Humphreys*, and could not deprive him of his right to the benefit of his bargain. *Rhodes's* equity was against *M'Clenachan* only, not against *Humphreys*, who was a purchaser without notice. *Humphreys* therefore is unquestionably entitled to compensation; the only question being about the rate of compensation. The case of *Nelson v. Matthews*, 2 H. & M. 164. furnishes the rule so far as the circumstances of that case are applicable to this, and shews that actual value, and not the purchase-money, is the standard.

2. The value at the time of the contract is not the proper standard. At that time *M'Clenachan* had not disabled himself to comply with the contract. The land was never lost by *Humphreys* until March, 1797, when the patent issued to *M'Clenachan* and *Rhodes* jointly. The value, therefore, at the date of the patent is what we contend for.

3. The decree was wrong in directing a conveyance to trustees, and a sale of the land, if the purchase-money should not be paid. Instead of this, it should have directed a conveyance to the heirs of *Humphreys*. However equitable the decree now in question might have been, if *M'Clenachan's* representative had sued in equity for the purchase-money, the case is different here. The bill was filed by the administrator of *Humphreys* for an injunction and specific performance. The heirs of *Humphreys*, indeed, were not before the Court, and it may be said that we ought to have made them parties. This seems to have been an oversight on both sides; but it was irregular to enter a final decree until the heirs were parties.

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The *Attorney-General* and *Wirt*, for the appellee, endeavoured to get the contract itself *rescinded*, on the grounds that it did not appear in evidence that *any* money had been paid by *Humphreys* towards complying with the bargain; that *M'Clenachan* was in habits of intoxication, and was said by some of the witnesses to have been drunk at the time the contract was made. At any rate, the contract, if not to be *rescinded*, ought not to be *specifically enforced* in a Court of Equity, being *unreasonable* and *oppressive*; (a) and *Humphreys*, the party now praying specific execution having shewn a backwardness on his part. (b)

(a) 1 Vern. 227. *Phillips v. Duke of Bucks.* 1 Fend. 30. note (c). 2 Eq. Cas. Abr. p. 56 c. 4. *Tristram v. Melhuish* Ibid. p. 19. c. 14 *Kien v. Strikely.* 2 Bro. Parl. Cases, 396 S. C. 5 *Viner.* 549. pl. 12. *Squire v. Baker.* *Precc. Ch.* 538.  
(b) 1 Bro. Parl. Cases, *Hayes v. Carrill.* 2 Bro. Parl. Cases, 447. *Wingfield v. Whaley.* *Sugden,* 246.

2. If the contract is to be enforced, it is improper to make *any* deduction on account of the land conveyed to *Rhodes* the locator. *M'Clenachan* bargained to sell *Humphreys* only *his right* to the land, *such as it was*; not knowing whether it stood on a survey, or patent; and subject, of course, to the *ordinary* deduction for compensation to the locator; which, it is proved, was *commonly* one third of the tract. The word "*expenses*" in the agreement related to office-fees only; not to *part of the land*. Can it be believed that he would, if in his senses, have sold the land for *three shillings* per acre, (which soon afterwards rose to *nine and twelve shillings*;) and yet have bound himself to make good any deficiency that might arise from the locator's claim. The great inadequacy of price strengthens the conclusion that such could not have been his intention. And, if *Mr. Wickham* be right in his construction of the contract, the impossibility of *M'Clenachan's* complying with it, in opposition to *Rhodes' prior equity*, furnishes an additional reason why it should not be specifically enforced.

3. But, if there ought to be a deduction, the Chancellor has resorted to the most equitable criterion. The *original bill* itself claimed no more than a "*proportionate*" deduction, which must be understood according to the value at the time of the contract; which value the parties themselves have fixed at three shillings per acre.

4. The decree was right in holding the *land* liable to be sold, in case the administrator of *Humphreys* should fail to pay the purchase-money. (c) There was no necessity to make his heirs parties; their title being merely *equitable*. Besides, this was not a bill to subject the land, but an application to the *discretion* of a Court of Equity, which had a right to *annex a condition* to its

(c) *Cole v. Scott,* 2 Wash. 142.



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decree, (by which the injunction was continued in force,) that, if the administrator, or the heirs of *Humphreys*, should fail to pay the money by a certain day, the land should be conveyed to trustees, &c. within the principle of the rule that he who asks equity must do equity. This was a favour granted the administrator on certain terms. However, if the heirs ought to have been parties, the *plaintiff* was to blame in not having made them so: and this Court might now modify the decree so as to direct that if he do not pay the money, by a day appointed, the injunction be dissolved; that the heirs be made parties, and the land ultimately liable. If such a decree as this should be entered, the appellant ought nevertheless to pay the costs; the appellee being the party substantially prevailing. (11)

(a) *Ellzey v. Land's Ex-ecutrix*, 2 H. & M. 589.

*Wickham*, in reply. If the bargain is void, we are surely entitled to an injunction to the judgments at law. *M'Clenachan's* administrator enforces the contract by suing on the bonds; yet attempts, in equity, to set aside the contract! If it be binding on one party, it surely is so on the other.

We admit that *M'Clenachan* sold only *his own right*. But, having previously parted with one third of the land, he ought to make good the deficiency; for his assignment to *Rhodes* was a fraud upon us. *Humphreys* was not guilty of any backwardness in fulfilling the contract on his part; since, until a title was made, he was not bound to pay a farthing. The rule in equity is always to grant an injunction to relieve against the demand of the money, where the vendor is unable to make a complete title. *Jolliffe v. Hite*, 1 Call, 301. *Quesnel v. Woodlief*, 2 H. & M. 173. and *Nelson v. Matthews*, *ibid.* 164. were all cases of injunctions to protect the purchaser from being compelled to pay the money. If it had been paid, *M'Clenachan's* administrator might have disposed of it in the way of administration; and the administrator of *Humphreys* might not be permitted to recover it back, in case the land should be lost; because he ought to have stopped it in the first instance.

The only question in the cause is the rate of compensation. This must be the value of the land at the time of the contract at least; but, in my opinion, it ought to be the value at the date of *Rhodes' patent*, which may be denominated the time of our

*eviction.\** We were not bound to *prove* the *precise* value at the last-mentioned period: it sufficiently appears that it was *more* than the rate at which *Humphreys* purchased. The exact amount can be ascertained by reference to a Commissioner or a Jury.

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*Saturday, November 16.* The Judges pronounced their opinions.

Judge TUCKER stated the case as above, and proceeded as follows :

The point most strongly contested in this Court was, whether *Humphreys* was entitled to a compensation for the deficiency of the larger tract, (the equitable title to which was, at the time of the contract, in *Rhodes*.) according to the *average price* of the whole, or according to the specific *value* of the land when *Rhodes* acquired his legal title thereto, by the patent from the Governor of *Kentucky*. Mr. *Wickham* contended for the latter.

The *price* of lands must, in all cases between the seller and the purchaser, be considered as the just *value* thereof *at the time of the contract*, regard being had to the terms and mode of payment agreed on between them : in other words, the *price* is the *value*, as agreed on by the *parties themselves*: if the contract be executory on *both* sides, the party who hath not yet fulfilled his own engagements, comes with an ill grace before a Court of Equity to demand *ample compensation*, or, more properly speaking, *vindictive damages* against the other party for any deficiency or failure on his part. Although *M'Clenachan*, either from want of information of *Breckenridge's* contract with *Rhodes*, on his behalf, or from some other cause, is alleged to have sold *Humphreys* the *whole* of the larger tract, instead of that part only to which he was justly entitled, that circumstance does not so clearly appear from the words of the contract itself, which only imports to convey all his *title, interest, claim and demand*, and every *emolument* arising from two *land-warrants* therein mentioned. It must not be forgotten that these warrants are assignable by law. It does not appear he then knew they were even *located*; he could not then be supposed to intend specifically to warrant the *quality* of the lands upon which they might be *located*: and, without some reference to *quality and quantity*, as connected with each other, no calculation of *value*, independent

\* Note. It did not appear that *Humphreys* was ever in possession of the land.

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(a) See *Nelson v. Matthews*, 2 H. & M. 164.

(b) *Ante*, p. 330.

of the *price*, can possibly be formed. I therefore think the Chancellor's decree correct in making the *price per acre* the standard by which the abatement *from the price* is to be made, in regard to the larger tract.(a) With respect to the lesser tract, the only inconvenience or expense which *Humphreys* has been exposed to, as far as appears by this record, was the compensation of 12l. 10s. *per* thousand acres paid to the *locator*. This, according to the very terms of the contract, *McClennan* had agreed to deduct from the amount of *Humphreys'* bonds. More, the latter could on no principle be entitled to, as was decided, I believe, in the case of *Hull v. Cunningham's Executors*, last term.(b) I approve also of the remainder of the decree, though some objections, not appearing upon the record, might, perhaps, have been taken to it.

1. In case of *eviction*, after a conveyance made with warranty, the value of the *lost* land, *as at the time of the eviction*, gives the rule by which the vendee is to be remunerated; but, when the contract is *executory*, a Court of Equity will adjust it, upon principles of equity according to the circumstances.

2. In case of a *deficiency*, the value at the time of the contract gives the rule; of which the *purchase-money* is the standard, where it does not appear that the *actual* value was different.

Judge ROANE. In the case of *Mills v. Bell*, 3 Call, 326. it was resolved by this Court that, in the case of an *eviction* after a conveyance made with warranty, the value of the *lost* land, *as at the time of eviction*, should give the rule by which the vendee is to be remunerated; for that "the purchaser is entitled, on the covenant, to the *increased* value of the estate, as well as for any improvements he may have made on it, but that when the contract is *executory*, a Court of Equity will adjust it upon principles of equity according to the circumstances."

Under the last branch of this position the said case of *Mills v. Bell* was adjusted. In the case of *Nelson v. Matthews*, 2 H. & M. 164. it was held that the *actual value* at the time of the contract should give the rule. This case, however, is supposed not to be in opposition to the principle laid down in *Mills v. Bell*, (*ut supra*), as it was the case of a *deficiency* in the quantity of land sold, and not an *eviction* of any part of that actually conveyed by the deed. There was no subject, therefore, *quoad* the matter in controversy, the value of which could have *increased*, or on which improvements could have been placed: the giving the purchaser, therefore, the *value* of his purchase at the time, with interest, would do him ample justice. This last case is analogous to the one before us; and the value of the deficient land, as at the time of the purchase, should give the rule in this case as in that: but, as it is not *objected* that the price contracted for is greater or less than the real value at the date of the contract, I

see no reason to depart from *that* in the present instance; and am for affirming the decree.

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The case of *Farley v. Shippen*, *Wythe's Rep.* p. 135. is conclusive as to the power of the Court over lands lying in another state, where the persons decreed against are within its jurisdiction. It is true that the commissioners or agents who are to carry the decree into execution ought to be within the jurisdiction, so as to be amenable to the process of the Court. In point of fact, I believe that the commissioners in this case do reside out of the limits of the Commonwealth; but, as this does not appear of record, it is not for us to take the objection.

Judge FLEMING. It is the unanimous opinion of the Court that the decree be affirmed.

*Hoe against Tebbs and Wife.*

Wednesday,  
October 31.

THIS was a special action on the case in the *Dumfries District Court*, by *William Tebbs*, and *Victoria* his wife, against *Bernard Hoe*, sen. late Sheriff of *Prince William County*. The declaration charged that the plaintiffs had, in a certain action of trespass, assault and battery, obtained a judgment, and sued out a writ of *capias ad satisfaciendum*, against one *Daniel Tebbs*, which was delivered to *George Lane*, one of the defendant's deputies, to execute, who thereupon took the body of the said *Daniel Tebbs* in execution; and that the said *George Lane*, "contriving, and unjustly intending, contrary to the duties of his office, to hurt, injure, and deprive the plaintiffs of the means and remedy of obtaining their damages and costs aforesaid, afterwards, (the said *Daniel Tebbs* being still in custody, &c.) did receive and take of the said *Daniel Tebbs*, together with *Willoughby Tebbs*

1. If, in a suit upon a prison-bounds bond, a Court possessing competent jurisdiction judge the bond void; the plaintiff may sue the Sheriff without appealing from the judgment though erroneous.

2. In such case the Sheriff, though not a party to the suit on the bond, is bound by the judgment; unless

he can prove it was obtained by collusion.

3. In an action against the Sheriff for an escape, a verdict in general terms, for the plaintiff, is not sufficient to authorize a judgment; notwithstanding the charge in the declaration be, that the Sheriff took a defective prison-bounds bond, and thereupon voluntarily permitted the prisoner to escape; and issue be joined on the plea of *not guilty*. An express finding by the Jury according to the act of 1792 concerning escapes, is absolutely necessary.

4. It seems, that a prison-bounds bond, taken payable to the plaintiff, is good at common law, and an action may be maintained upon it.

5. *Quære*, whether it be not also good under the act of Assembly?

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as his security, a prison-bonds bond payable to the *plaintiffs*, (and not to the *Sheriff*,") which was set forth *in hæc verba*: "and thereupon the said *Lane*, without the license of the *plaintiffs*, and against their will, *contrary to the duties of his office*, *freely and voluntarily permitted and suffered* the said *Daniel Tebbs* to *escape*, and go at large, out of the custody of the said *Lane*, so being Deputy Sheriff as aforesaid, wheresoever he would, the *plaintiffs* being wholly unsatisfied for their damages," &c.

The declaration charged, moreover, that the *plaintiffs* thereafter brought an action in the said District Court on the said bond; and that, by the judgment of the Court, the said bond was declared to be illegal, and that an action was not sustainable thereon; by reason of which premises the *plaintiffs* had never received and recovered their damages and costs first mentioned, but had been run to great trouble and expense in prosecuting, and discharging the costs accruing on the action sued out by them on said bond," &c.

The defendant pleaded not guilty; and, issue being joined, a verdict was found in the following words: "We of the Jury find for the *plaintiffs*, and do assess their damage to one hundred and eight pounds, five shillings." A motion was made in arrest of judgment; 1. "Because the Jury who tried the issue had *not expressly found* that *Daniel Tebbs* the prisoner did *escape* with the *consent*, or through the *negligence* of the defendant, or his officer; or that he might have been retaken, and that the defendant and his officer neglected to make immediate pursuit;" and, 2. "Because the whole proceedings were erroneous and irregular." The Court overruled the motion, and gave judgment for the *plaintiffs*: the defendant appealed.

*Botts*, for the appellant, made three points; 1. That the prison-bonds bond set out in the declaration was a *valid* one. The 21st, section of the act of 1748, c. 8. (a) repealed in 1793, (b) (under which this bond was taken,) does not expressly say to *whom* it should be payable; but the strong implication is, *to the plaintiff*; the act not requiring it to be payable to the *Sheriff*. In like manner, the law relating to forthcoming bonds, (c) though it uses the expression, "if the owner of such goods and chattels shall give sufficient security *to such Sheriff*," &c. has always been construed as requiring such bonds to be made "*payable to the plaintiff*." It

(a) Edit. of  
1769, p. 196.  
(b) 1 Rev.  
Code, c. 151.  
s. 37. p. 393.

(c) Edit. of  
1769, p. 194.  
s. 12. 1 Rev.  
Code, p. 298.  
s. 13.

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(a) Edit. of  
1769, p. 446.  
1 Rev. Code,  
c. 79 s. 2. p.  
119.

(b) Edit. of  
1769, p. 184.  
1 Rev. Code,  
c. 80 s. 17. p.  
122.

(c) 6 Bac.  
Abr. (Grill.  
edit.) 179. 1  
Term Rep.  
422. Rogers  
v. Reeves.

(d) Johnsons  
v. Merive-  
ther, 3 Call,  
523. Hewlett  
v. Chamber-  
layne, 1 Wash.  
367. Beale v.  
Downman, 1  
Call, 249.

(e) 1 Call, 51.  
Drew v. An-  
derson. Run-  
non Eject. 364.  
367.

(f) 1 Rev.  
Code, c. 79.  
s. 3. p. 119.  
Johnson v.  
Macon, 1  
Wash. 4.

is true that, by the act of 1764, c. 6. s. 1.(a) the Sheriff is directed to assign over and deliver the prison-bonds bond to the plaintiff: but this only shews that the Legislature supposed the bond *might* be taken payable to the Sheriff; not that the law *required* it. Indeed, it answers every beneficial purpose to take it to the plaintiff, or to the Sheriff *for his benefit*. The 7th section of the act of 1748, c. 6.(b) does not vitiate this bond; first, because it was taken under the authority of the before-mentioned act of Assembly; and, secondly, because the clause now in question relates only to bail-bonds or bonds for "*appearance*." The same construction, viz. that it related only to persons arrested on *mesne process*, was given in *England* to the statute 23 Hen. VI. c. 9.; from which ours is copied.(c)

But in many cases where a bond is not sufficient, under the act of Assembly, to authorize a motion in a summary way, it has been decided that an action may be maintained upon it at *common law*:(d) particularly, where a statute requires a bond to be taken payable to the *plaintiff*, it is valid as a *common law bond*, though taken to the *Sheriff*: the converse of which rule ought equally to hold good.

2. The judgment in the suit on the bond, to which the present appellant was no party, ought not to bind *him*; especially as that judgment was illegal.(e)

3. The verdict of the Jury in this suit is imperfect, in not EXPRESSLY finding that the debtor escaped with the *consent* or through the *negligence* of the Sheriff.(f) The Clerk's entry that the Jury found the defendant "*guilty in manner and form as charged in the declaration*," is merely the clerical *form* of recording the verdict, but does not satisfy the act of Assembly. At common law, it would be otherwise. On a general verdict of "*guilty*," the Court would adjudge that the Sheriff had been guilty of voluntarily permitting the escape of the prisoner. But this act goes farther; and for wise reasons. A Jury might shrink from finding a *voluntary* escape, when through hurry or inadvertency, they might find a *general* verdict for the plaintiff. But, however this may be, the words of the act are plain, and positive, and must be obeyed.

*Williams*, contra. The action in this case may be considered, either, *as on the case* for a voluntary escape, or, (more properly,)

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as against the Sheriff for misfeasance in office, in taking a bond which was not such as the law required.

This being an action on the case, the verdict *substantially* complied with the law: for the point put in issue by the plea of "*not guilty*" was, whether the defendant was guilty *in manner and form as charged in the declaration*; and the verdict of the Jury, by finding the issue in favour of the plaintiff, *expressly* found that the defendant was guilty *in the same manner and form*. How far, indeed, the act of Assembly is applicable to actions on the case for escapes, might be questioned; since, in such actions, the Jury inquire into all the circumstances, and give such damages as they may deem proper; (a) whereas, in debt for an escape they must give the *whole debt*. In the last-mentioned action a *special finding* by the Jury, that the escape was *voluntary*, may be requisite because the plea of *nil debet* does not expressly put that point in issue. But, in the action on the case, it is otherwise; a finding to the same *purport* being sufficient; for the Legislature have not pretended to prescribe the *form*, but the *substance* of the verdict. The case of *Johnson v. Macon*, 1 Wash. 4. is not like this; having been decided on the ground of there being *no proof* of an *actual* escape. In that case, too, it is said that "the *consent* or *negligence* of the Sheriff, though made necessary by the act of Assembly, ought to be *presumed*, unless on the Sheriff's part, a tortious escape be shewn, and that fresh pursuit was made."

But, secondly, this is an action against the Sheriff, for misfeasance in office, in taking a bond, contrary to law, to the injury of the plaintiffs. The fair inference from the 21st section of the act of 1748, c. 8. is, that the Legislature intended the bond (which the *Sheriff* was to take) to be payable to the *Sheriff*; because the law did not direct it to be taken to any other person. The law concerning escapes (b) puts this beyond a doubt, by directing the *prison-bonds* to be assigned to the creditor; whereas *forthcoming* and *replevin bonds* are only to be *delivered* (not assigned) to the creditor, or to be returned to the Clerk's office. The bond being payable to the *plaintiff*, was therefore certainly not good as a *statutory* bond; and, if it were good as a *common law* bond, the Sheriff is not thereby cleared from responsibility; for it was his duty to take such a bond as the *statute* required. The plaintiff had his *election* to sue either the obligor, or the

(a) *Bonafous v. Walker*, 2 Term Rep. 126. 1 Vent. 211. 217.

(b) 1764, c. 6. s. 1. Edit. of 1769, p. 446.

Sheriff. But the case of *Syme v. Griffin*(a) is a plain authority to shew that this bond was utterly void.

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*Botts*, in reply. I admit that the verdict, finding the defendant guilty, did find the declaration in *substance*. Nevertheless, the Legislature, intending to reform the common law in this particular, demands an express declaration from the mouths of the Jury, that it was a voluntary or negligent escape, or that there was not fresh pursuit. Where the words of a statute are plain, *consequences* are not to be regarded; for this would be to usurp legislative authority; (b) and this act is penned in terms precluding all possible ambiguity. In *Johnson v. Macon*, 1 Wash. 6. the President of this Court, in reference to the same act, says, the finding that the escape was voluntary, or negligent, must be *express*.

(a) 4 H. & M. 277.

(b) 6 Bac. 391. (Gwill edit.) 1 Term Rep. 728. The King v. Hogg.

The two arguments offered by Mr. *Williams* and myself shew strongly that it makes no difference whether the bond was given to the Sheriff or plaintiff; the law *not having directed which*. Why should the *Sheriff* be more naturally designated as the obligee than the *plaintiff*? The plaintiff in this case accepted the bond, and *made his election* by suing the obligor. The bond, being good at common law, was as beneficial to the plaintiff, as if taken according to the act of Assembly; the mode of proceeding and recovery being the same.

Judge TUCKER stated the case, and proceeded. The motion in arrest of judgment in this case seems to have been founded upon the third section of the act concerning the escape of debtors, (d) which declares that no judgment shall be entered against any Sheriff, or other officer, in any suit brought upon the escape of any debtor in his or their custody, unless the Jury, who shall try the issue, *shall expressly find* that such debtor did escape with the consent, or through the negligence of such Sheriff; or that such prisoner might have been retaken, and that the Sheriff and his officers neglected to make immediate pursuit.

(a) 1 Rev. Code, c. 79.

I conceive that there is no principle of the common law more generally acknowledged, or more demonstrably true, than that, whenever the defendant in any action whatsoever pleads the general issue, and relies on that plea only, if the Jury find a general verdict for the plaintiff, every material fact, allegation and averment, which is sufficiently charged in the declaration,



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ration to support an action thereupon, is by such verdict as substantially and *expressly* found to be true, as if the Jury had repeated the declaration, clause by clause, *verbatim*, in their verdict. And this is proved by the manner and form of pleading, which, we are told by Sir *Edward Coke*, 1 *Inst.* 115. b. affords one of the best arguments, or proofs in law, when drawn from *right entries*, or course of pleading; for that the law itself speaketh by good pleading. Now the right entry, or course of pleading in this case is, that the defendant, by his attorney, comes and defends the wrong and injury, and saith that he is *not guilty in manner and form* as the plaintiff hath complained against him; and of *this* he putteth himself upon the country; and the plaintiff likewise. Thus, the issue for the Jury to try, is whether the defendant be *guilty, in MANNER and FORM* as the plaintiff hath complained against him: they have answered that he *is guilty*, and assess the plaintiff's damages. The Court, whose duty it was to mould this verdict into proper form, have done so, and it is accordingly entered that he is *guilty in manner and form* as the plaintiff by replying hath alleged. But the replication is not *special*, but merely joins the issue tendered by the defendant in his plea: it denies the truth of the plea, as the plea had before denied the truth of the charge in the declaration, *in manner and form* as the same was therein set forth. And the verdict, by affirming the truth of the issue thus joined between the parties, has, in my opinion, not only substantially, but *expressly*, found that the debtor did escape with the *consent* of the Deputy Sheriff; it being *expressly charged* in the declaration, that the Deputy Sheriff, *contrary to the duties of his office, freely and voluntarily PERMITTED and SUFFERED the said Daniel Tebbs to ESCAPE and GO*

AT LARGE.(a)

(a) 1 Wash. 6.  
Johnson v.  
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Thus far I have spoken upon the general principles of the common law, and the right course of pleading. I will now notice the preamble to the clause of the act before recited, and upon which the defendant has relied for his indemnification; premising that the County Court law requires the Court of every County (under a penalty on the Justices, if they fail to do so) to build, and keep in repair, a common gaol and county prison, *well secured*, with iron bars, bolts and locks. The frequent neglect of this injunction is thus noticed by the Legislature in the act concerning escapes, s. 3. "And whereas the situation of most, prisons in,

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this Commonwealth hath given opportunities to evil disposed persons to BREAK OPEN *the same*, and TURN OUT debtors and others in custody, to the hindrance of justice, *prejudice of creditors*, and RUIN OF SHERIFFS, *who have been compelled to pay the debts*, with which such prisoners stood charged; for *remedy THEREOF*, Be it enacted that no judgment," &c. We are told by the same eminent Judge before referred to, (a) that the preamble of a statute is the *key to the mind* of the Legislature. What, then, was it in the mind of the Legislature to remedy in this case? The INSUFFICIENCY of the COUNTY GAOLS: for to that object alone, and the means it afforded disorderly persons to violate the laws, was their attention turned, and not to any *voluntary act of misfeasance* on the part of the Sheriff, whether the same were committed through *wilfulness* or *mistake*. Here the Sheriff is charged with an unlawful, and therefore unjustifiable act, proceeding from one or the other of those causes; it is immaterial which; for, if a Sheriff *mistakes* his authority, he is *civilly* answerable, equally as if he had wilfully offended. I am therefore of opinion that the judgment be affirmed.

(a) Co. Litt.  
79. a.

Judge ROANE. The judgment of the District Court in the action upon the prison-bonds' bond having been in favour of the defendants, upon the ground that the bond was illegal and void; and *that* judgment being still in full force and unreversed, we must now take it to be correct, and the bond sued upon to be void, whatever opinion the Court may entertain upon the question, as occurring in the present action. It was not incumbent on the appellee to have appealed from that judgment to the Court of the last resort; but it was competent for him to proceed upon the judgment of the District Court, in the present action against the appellant; reserving to the appellant, however, the right to shew that that judgment was obtained by the connivance or collusion of the appellee. These conclusions seem entirely warranted by analogy to the decision of this Court in the case of *Lee, Executor of Daniel, v. Cooke*, 1 Wash. 306. That was an action against a warrantor of a slave recovered from the warrantee by the judgment of the *District* Court, and it was adjudged not to be necessary to aver in the declaration, or to prove, that notice was given to the warrantor of the pendency of the action against the warrantee; for that every judgment of a Court of

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Justice is presumed to be fair till the contrary appear; and, if there was any collusion between the parties in that action, it should have been pleaded and proved on the part of the defendant. In that case, as in this, a man was *affected* by the judgment in a suit to which he was no party: and in that case, as in this, the decision of a *subordinate* Court was held sufficient to support the second action, as being conclusive upon the point decided, only reserving power to the defendant to shew that the parties to the former action had colluded to his injury.

I shall therefore proceed upon the idea that the bond in question is void; though my opinion is, that it is not so at *common law*, however it may be under the *statute*, as to which I have formed no conclusive opinion. The case of *Johnson and Meriwether*, and the other cases cited by Mr. *Botts*, prove this, in my judgment, incontestably: and, however this bond may stand justified in *other* respects by our statute, I am inclined to think that the 17th section of the act concerning Sheriffs(a) does not extend to bonds given by parties *in execution*, but to such only as are given by persons arrested on mesne process. This has been decided in relation to the *English* statute, (to which our's substantially corresponds,) in the case of *Rogers v. Reeves*, 1 *Term Rep.* 421. And, although a contrary opinion *seems* to have been hinted at by this Court in the case of *Syme v. Griffin*, yet this point was not made in that case; and, besides, that decision *may* stand justified by another ground taken by the Judges, namely, that a part of the condition of the bond was adjudged to be void by the principles of the common law.

Taking this, then, to be a void bond, as by the decision aforesaid it is declared to be, the releasement of the prisoner from gaol was "an escape with the *consent*, and through the *negligence* of the Sheriff," and such escape is the very *gist* of this action. There can be no real difference between a releasement of a prisoner without taking *any*, or taking only a void and ineffectual obligation. The Sheriff is bound to retain the prisoner in gaol, unless he gives a bond in all respects such as is required by the law allowing the liberty of the prison rules. Unless that bond be *perfect*, the party injured is not bound to proceed upon it against the obligors therein; but is at liberty to pursue the Sheriff on the ground of an illegal discharge of the prisoner.

Such being the nature of this action; it being, in effect, an

(a) 1 *Rev. Code*, p. 122.

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action against the Sheriff for the escape of the prisoner; the law (as well as the case of *Johnson v. Macon*, 1 Wash. 4.) is impetuous that the Jury should expressly find the escape to have been with the consent, or through the negligence, of the defendant. This requisite cannot be supplied by any intendment or reference whatsoever; not even by the very strong circumstance, denoting such consent, that a bond was in fact taken by the Sheriff at the time, which was afterwards, however, adjudged to be void.

On these grounds, I am of opinion, that the District Court erred in rendering judgment on the verdict in question, and that its judgment ought to be reversed.

Judge FLEMING, after stating the case. With respect to the charge, that the bond for keeping the prison bounds was made payable to the *plaintiffs* instead of the *Sheriff*, I consider that as no good ground of action; for, though it was not taken in strict conformity to the act of Assembly, respecting the persons to whom payable, yet it was a good bond at common law, according to the decisions of this Court in the cases of *Meriwether v. Johnson*, and others; and, had the appellees appealed from the decision of the District Court, I have no doubt that judgment would have been reversed by this Court, and the action brought upon the bond sustained. In the case of *Syme v. Griffin* the condition of the bond was illegal in itself; and therefore no action could have been maintained upon it.

With respect to the escape, no judgment, in my conception, ought to have been entered on the verdict; for, by the act of 1792, c. 79. sect. 3. it is enacted, "that no judgment shall be entered against any Sheriff, or other officer, in any suit brought upon the escape of any debtor in his or their custody, unless the Jury who shall try the issue shall EXPRESSLY find that such debtor or prisoner did escape, with the consent, or through the negligence, of such Sheriff, or Serjeant, or his officer or officers; or that such prisoner might have been retaken, and that the Sheriff, or Serjeant, and his officers, neglected to make immediate pursuit." In the verdict before us there is no such finding, nor any thing similar, or tantamount; and it seems to me that the rule of the common law that has been mentioned does not apply in this case; it being taken away by a special clause in the act of Assembly above mentioned.

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As to the rule, "that the preamble of a statute furnishes a guide to its construction," where the enacting words are *ambiguous*, or *doubtful*, it may be well to resort to the preamble as a key to discover the will and intention of the Legislature; but where an enacting clause is *clear* and *explicit*, as in the present case, it seems to me improper to resort to the preamble, to discover the meaning of the statute, in order to give it an operation, or to destroy its effect, contrary to the will of the Legislature.

I am of opinion, upon the whole, that the judgment is erroneous, and ought to be reversed; and the cause remanded to the Superior Court of *Prince William*, for a new trial to be had therein.

Judgment reversed, and new trial directed.

Monday,  
October 16.

## Henderson against Hudson.

The statute to prevent frauds and perjuries applies to an agreement between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only *parol* evidence of subsequent declarations and acknowledgments by the parties.

THIS was a suit in the late High Court of Chancery, brought by *Christopher Hudson* against *John Henderson*, for the purpose of obtaining a conveyance of a moiety of a tract of land purchased by the defendant of a certain *Thomas Booth*, and of *Robert Andrews*, who, as executor of *Samuel Beall*, deceased, had a mortgage upon it. The plaintiff relied on a *verbal* agreement between himself and the defendant, that he should be let in as a partner in the purchase. The defendant in his answer denied the agreement, and claimed the benefit of the statute to prevent frauds and perjuries. The testimony related altogether to *parol* declarations and acknowledgments by the parties at sundry times subsequent to the alleged agreement. The late Chancellor, Mr. WYTHE, was of opinion, "that the defendant was by the testimony proved to have agreed to associate the plaintiff in the purchase of the land; that the statute applied only to contracts and actions upon them, (*quæ frequentius accidunt*,) between the BUYERS and the SELLERS of lands," but not to such a contract as the one now in question; "that the defendant, (when he transacted with the sellers the business about which they treated,) observing good faith, would have joined the plaintiff's name in the convey-

ances; that, if the statute were capable of an exposition comprehending such an example as the present subject of litigation, it ought rather to be called an act to *permit fraud and perfidy*."

He therefore decreed "that the defendant convey with warranty against himself, and claimants under him, one moiety of the land purchased by him of *Thomas Booth*, and deliver possession thereof to the plaintiff, upon payment by him of the like proportion of the purchase-money, with interest, to the defendant; which moiety the County Surveyor was ordered to distinguish and describe on a map, in presence, and by direction, of Commissioners appointed to superintend the partition, and to allot and assign the purparties. And the said Commissioners were required to report the said plan, allotment and assignment, with an account stated between the parties, debiting one with his proportion of the purchase-money and interest, and the other with one half of the profits of the said land, whilst he had withholden the possession thereof." From which decree the defendant appealed.

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*Wickham*, for the appellant, took a view of the evidence, by which he contended the contract alleged in the bill was *not* proved. Some conversation between the plaintiff and defendant on the subject of a proposed partnership in the purchase was admitted in the answer: but the defendant says that the contract was not closed, because an advance of money on the part of the plaintiff was necessary; and every circumstance in the case proves this. Especially, if *Hudson* was a partner, is it not unaccountable that he should never have been called upon to advance his share of the purchase-money?

But the statute of frauds puts an end to all question. This is the very kind of case intended to be prevented, by the statute, from coming before a Court of Justice. The contract, as *alleged*, was not to be performed *within one year*; and, even if not for *land*, could not be enforced.

*Pryton Randolph*, for the appellee. The statute of frauds does not relate to a contract *between joint purchasers* of land; but only to contracts between vendor and vendee. *Hudson* (the *appellee*) originally contracted for the land: *Henderson* (the *appellant*) applied to be admitted as a partner. At that time the

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land had not been purchased. According to the bargain made by *Hudson* on his application, he was a mere agent and trustee. As between *Hudson* and *Henderson*, it was only a contract that *Henderson*, as agent for both, should buy the land; not a contract of *Hudson* to buy the land of *Henderson*. Why should he employ *Henderson* to purchase, if not for their mutual benefit? The testimony proves his great anxiety to purchase; and that he understood the bargain was joint: yet, according to the answer, you lose sight of *him* altogether.

*Wirt*, on the same side, quoted *Moseley's Rep.* 39. *Atkins v. Rowe*, as shewing that where a man sends an agent to buy land with his money, and the agent takes the deed in his own name, the principal, on proving this by *parol* evidence might claim the land in equity; and he was inclined to think that, even if the agent paid his own money, the Court would give the principal relief. The case of *Waller v. Hendon*, 5 *Viner*, 424. proves that an authority to treat, or buy, may be good without writing, and binds the principal to pay the money, for which his agent may agree. In the present case, what was *Henderson* but an agent for *Hudson*, as to one half of this land? The contract should bind him to *Hudson*, as it would bind *Hudson* to the seller. A contrary doctrine would destroy all agency by *parol*: and, though declarations of trusts are required by the statute to be in writing; yet such as arise by operation or construction of law are excepted; as, where the conveyance has been made to one, but the purchase-money was paid by another; this is a resulting trust for him who paid the money; (a) and the existence of such trust may be established by *parol* evidence, shewing the mean circumstances of the pretended purchaser; (b) or by the party's own confession: (c) or other circumstances. (d) The objection that this will open the door to *perjuries* applies in all these cases; but it shuts the door to *frauds*. The cases of contracts partly performed are of the same sort: yet the law is well settled that part-performance takes a *parol* agreement out of the statute. *Lamas v. Bayly*, 2 *Vern.* 627. which seems against me, was not a case of a joint purchase, but of an agreement that, after the purchase, *Lamas* should have part as purchaser from *Bayly*, who, in the first instance, bought singly. But the authority of that case, as reported in *Vernon*, has been questioned. (e)

(a) *Willis v. Willis*, 2 *Atk.* 71.

(b) *Ibid.*

(c) 2 *Atk.* 150. note. *Noland's* edit.

(d) 5 *Viner*, 621. pl. 31. *Selack v. Harris*.

(e) 1 *Pow. on Cont.* 310. referring to 5 *Vin.* 521. pl. 32. and to 2

*Eq. Cases Abr.* 45. pl. 10. as reports of the same case.

Wickham, in reply. The case of *Lamas v. Bayly* is conclusive upon the present question; applying directly in my favour. *Vernon*, by whom it is reported, was an able lawyer; and his authority is better than that of *Viner*, who was a mere compiler. But even as reported in *Viner*, and 2 *Eq. Cas. Abr.* it is not against me; for it is there said that the very agreement charged in the bill was admitted in the answer, and yet, on the ground of its being *ambiguous* and *uncertain*, the contract was not enforced; "the statute being intended to *oust* as well *all* such *ambiguous* agreements, as to prevent perjuries," &c. The case therefore was stronger than ours, in which the pretended contract is *denied* in the answer. *Atkins v. Rowe*,<sup>(a)</sup> quoted by Mr. Wirt, contains nothing decisive. The Chancellor there "let the plea stand for an answer," with liberty to except; but did not overrule the plea, or give any positive opinion; and the reporter concludes with a *quære*. *Waller v. Hendon*, 5 *Viner*, 424. is not law; for a power of attorney to buy or sell land must be in *writing*, to be binding on the principal.

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(a) *Moseley*,  
39.

I admit that, where by *fraud* a contract is *prevented* from being in writing, the statute does not apply. *Selluck v. Harris*, 5 *Viner*, 421. is not like this case. In 2 *Atk.* 150. *Lane v. Dighton*, *Amb.* 409. is referred to; and that was not a case where *parol evidence of the party's confession* was admitted; the rule is, that such *confession* must either be in *writing*, or appear *judicially*, by the answer.<sup>(b)</sup>

(b) *Ryall v. Ryall*, 1 *Atk.* 59. *Ambrose v. Ambrose*, 1 *P. Wms.* 322.

Wednesday, October 31. The Judges pronounced their opinions.

Judge TUCKER. The bill charges that the complainant having begun a treaty with Mr. *Andrews*, and one *Booth*, for the purchase of a tract of land mortgaged by the latter to *Samuel Beall*, deceased, whose executor Mr. *Andrews* was, a conversation took place between the complainant and the defendant, from which the former discovered that the latter was desirous of purchasing the same land, and consulted the complainant on the means of effecting the purchase; that the defendant proposed to the complainant during that conversation to admit him as a partner in the purchase, which he refused; that, shortly after, meeting with the defendant again, the latter repeated his former proposition of



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a partnership, which he again refused; that the defendant "then promised that, if the complainant would give him an interest in the purchase, he would be at all the trouble and expense of waiting on Messrs *Andrews* and *Booth*, and, at the expiration of four or five years, would let the complainant have *his part again*; that, upon the complainant's objecting to that condition that the defendant would, *then*, probably demand too high a price for his part, he said, he would agree to leave the price to be settled by referees; as he only wished to be paid for his improvements, and whatever rise might take place in the price of lands after the purchase: that the complainant *then* acceded to the defendant's proposition, *solely upon* the conditions last mentioned; and it was agreed between them that the defendant might offer as far as 400*l.* or 500*l.*, with as long a credit as possible; the *complainant* assigning as a reason that he did not know at that time what price he might get for his wheat and tobacco:" that the defendant accordingly went down, and made the purchase, and, on his return, informed the complainant thereof, and of the terms, viz. 100*l.* cash to *Booth*, and 300*l.* to Mr. *Andrews*, in two annual payments; that the defendant has since refused to let him have his stipulated proportion, although he has always been ready to pay his proportion of the price, and has actually tendered to the defendant 60*l.* as a compensation for the 50*l.*, which he had advanced on the first purchase.

The defendant answered, setting forth several conversations, between the complainant and himself, on the subject, "and denying that those conversations ever *terminated in a contract*, or ever approached nearer to one than he had before stated." In an amended answer which he was permitted to file, he insists upon the benefit of the statute of *frauds* and *perjuries*.

I shall briefly observe upon this answer, that the conversations which it states differ very materially from those set forth in the bill; that no witnesses (of whom a great number were examined) were present at the time of making the contract; their testimony going only to *conversations* between the parties in their presence subsequent to the purchase; or to communications made to them at different times by the plaintiff, or defendant. And, although one witness, Mr. *Carter*, swears positively, "that the defendant *informed him* that he and the complainant were in *partnership* in that purchase, and that he had made a very advantageous bar-

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gain,\* yet even *he* does not mention the *terms* of the partnership, nor any particulars whatsoever relating thereto. Another witness, *James Lucas*, says the defendant told him that the complainant *was to join him* in the purchase of the land, OR WISHED TO DO so; but he cannot recollect *which of those expressions* he used. Two other witnesses, *William Clarkson* and *David Anderson*, whose depositions were much relied on by the complainant's counsel, and are, in fact, in great measure *literal transcripts* of each other, (a circumstance which in my mind does not strengthen, their testimony,) state a conversation between the parties in their presence respectively, in which they both say, in the *same words*, that each of them "heard the complainant demand of the defendant a compliance with a contract which the *complainant* stated to have existed between the defendant and himself respecting a partnership in the purchase of the aforesaid tract of land, *the particulars of which contract the deponent does not recollect to have heard*, except so far as relates to a conversation which the *complainant* stated to have taken place between them to the following effect;" which they set forth, nearly, or entirely, in the same words; and in which the complainant and defendant contradicted each other in several particulars. Neither does any thing stated by them in their depositions shew the terms of the agreement (if any can be collected, or presumed, from what they say) to be such as the complainant has set forth in his bill.

I deem it unnecessary to enter into a more minute examination of the evidence, the statute of frauds and perjuries being relied on by the defendant in his amended answer.

In giving my opinion in the case of *Argenbright v. Campbell*, (a) (a) 3H & M. 180.  
I said, that the true intent and meaning of our statute of frauds and perjuries was, according to my apprehension, to reduce all such parol agreements as are mentioned in the purview of the act to the level of a mere *nudum pactum*, or of a mere *colloquium*, or the *inception* of a contract, instead of the *completion* of it; that although it was very clear that the statute intended to *prevent fraud* as well as perjury, yet, from the purview of it, declaring that *no ACTION shall be BROUGHT* in the cases therein enumerated, the true intent of the statute was to prevent the *fraudulent imputation* of a contract, rather than the *fraudulent denial* of one; and, therefore, that all promises, agreements, and contrarts within the purview of the statute, *if not reduced to writing and signed pur-*

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suant to the statute, and if nothing were done, in performance thereof, whereby the actual state of the parties, or one of them, is *materially* affected, ought to be considered as *imperfect* and *incomplete*, so as to be incapable of supporting a suit either at law, or in equity. For the reasons and authorities in support of this opinion, I beg leave to refer to that case, p. 160—169. An opinion not very dissimilar to some parts of the preceding

(a) 1 H. & M.  
92.

may be found in the case of *Rowton v. Rowton*, (a) delivered by another member of the Court. And, though, in that case, I was of opinion that the contract was not only fully proved, but *fully executed* on the part of the son, and his situation thereby *materially altered*, the difference of opinion between myself and a majority of the Court did not arise from a different construction of the true policy of that statute, but from the difference of opinion which was entertained respecting its application to the peculiar circumstances of that case. In the case of *Cooth v. Jackson*, (b)

(b) 6 Ves. jun.  
30.

Lord Chancellor *Eldon* declared that, if a defendant denies that any parol agreement ever took place, a Court of Equity will not inquire into the truth of *that* denial. The same Judge says, in the same page, that all the doctrine of a Court of Equity attributes great weight to the oath of the defendant; and that the moment the defendant, in the form in which issue is joined in that Court, in his answer says that there was *no agreement*, *the witness cannot be heard*; or, if he was heard, unless supported by special circumstances, giving his testimony greater weight than the denial by the answer, the Court could not make a decree. In the case now before us, the agreement charged in the bill is denied by the answer, and the whole mass of evidence taken together does not prove it as alleged in the bill. The statute appears to me emphatically to apply to such a case.

But it is objected, this is not a contract for the *sale* of lands, but for a purchase thereof in partnership. Whoever looks at it, as charged in the bill, must, I think, be sensible it was for *both*: the terms on which the complainant alleged he was to have the defendant's part back again, appear to me incapable of being understood in any other sense. The contract also must, I conceive, be taken as *one entire contract*, and not as different bargains. The latter part being, for the reasons just mentioned, within the statute, the cases of *Cooke v. Tombs*, (c) and *Lea v. Barber*, (d) are, in my apprehension, conclusive against the Chancellor's decree.

(c) 2 Anstr.  
480.

(d) *Ibid.* 486.  
in a note.

The case of *Chater v. Beckett*(a) is an affirmance of the same principle. So was that of *Lord Lexington v. Clarke*,(b) if the note of it in the report of *Chater v. Beckett* be correct. I have not the book to refer to. I will here say, with Lord ~~Kempen~~, in the last-mentioned case, "that I lament extremely that exceptions were ever introduced in construing the statute of frauds: it is a very beneficial statute; and if the Courts had, at first, abided by the strict letter of the act, it would have prevented a multitude of suits that have since been brought."

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(a) 7 Term  
Rep. 901.  
(b) 2 Term.  
232.

I am of opinion that the decree be reversed, and the bill dismissed.

Judge FLEMING.\* It is agreed by the counsel on both sides that the only two points in the cause are, 1st. Whether the case be within the statute of frauds and perjuries; and, 2dly. Whether the contract, as stated in the bill, has been proved; both of which appear to me in favour of the appellant: but I shall reverse the order, and first consider whether the contract, as stated in the bill, be proved? And I have no hesitation in saying that it is not proved to my satisfaction. It is, in the first place, expressly denied by the answer, which is corroborated in some of its material parts by oral testimony: and, in the whole cloud of witnesses examined on the part of the appellee, not one was present at the time of the pretended contract or agreement between the parties; but the whole of their testimony relates to loose confessions of the appellant, and assertions of the appellee when the matter in controversy happened to be the subject of conversation: and not a single witness pretends to have heard the appellant state or confess the substance or conditions of any agreement whatever between the parties, relative to the subject in dispute. Such evidence as this (were the statute of frauds and perjuries out of the way) is, in my mind, too slight and feeble to deprive any one of his freehold and inheritance, or any part thereof.

2dly. But, were the oral testimony of the appellee more particular and pointed in support of the contract, it appears to me, (notwithstanding the opinion of the Chancellor to the contrary,) that the case is within the statute of frauds and perjuries, which I consider as a very beneficial and salutary law, that has been too

\* Judge ROANE did not sit in this case.

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much disregarded in some of our Superior Courts of Chancery And, although, in the case before us, it is not immediately between a buyer and seller of land, yet it is within the mischief intended to be guarded against by the statute, which being a remedial one, and intended to prevent a growing evil, ought to be liberally construed: and the admission of oral testimony to prove the agreement, denied by the appellant, tended by imputation to deprive him of a considerable part of his freehold and inheritance. But the first point being, in my apprehension, clearly against the appellee, I have considered the latter with less attention than I otherwise should have done. And, upon the whole, I concur in the opinion that the decree be reversed, and the bill dismissed with costs.

Decree reversed, and bill dismissed.

Monday,  
November 11.

Harvey and Wife against Pecks.

1. A deed from a husband and wife without her privy examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance.

2. What are badges of fraud in obtaining a deed.

*BENJAMIN BORDEN*, the elder, by his last will, dated the 3d of April, 1742, and admitted to record the 9th of December, 1743, gave to five of his daughters (of whom *Lydia*, who afterwards married *Jacob Peck*, was one) five thousand acres of land, "all of good quality;" (being part of his lands on *James River*, without specifying the situation or boundaries;) "that is, one thousand acres of good land, a piece, to every one of the said five daughters, to them and their heirs and assigns for ever;" and all the rest of his said lands to be sold, &c.

By a deed of bargain and sale, dated the 17th of September, 1745, *Jacob Peck*, and *Lydia* his wife, for and in consideration of the sum of 30*l.* current money, conveyed to *Benjamin Borden*, the younger, who was the testator's executor, "all the said *Jacob's* part of the land which he had by virtue of his intermarriage with the said *Lydia*, containing one thousand acres, situate, lying and being on one of the branches of *James River*, and in that part of *Orange* called *Augusta*," without any farther description; the land, as it seems, having never been allotted according to the will. This deed had the name of *Lydia Peck* as well as that of

*Jacob* subscribed, *without a mark*; and her privy examination and relinquishment were not taken.

On the 19th of *May*, 1747, a bond in the penalty of 70*l.* was executed by *Jacob Peck* to *Benjamin Borden*, conditioned, that if the said deed was not good, having been executed before the said *Jacob Peck* (who was a native of *Germany*) had been *naturalized*, he was to make a good and lawful deed when demanded; and, on the 19th of *January*, 1748, a receipt "in full satisfaction for one thousand acres of land, upon the waters of *James River*, which was left to *Lydia Borden*, by her deceased father," (without mentioning any sum of money as paid,) was also given.

*Benjamin Borden*, the younger, having departed this life; and *Martha Borden*, his only daughter and heiress, having married *Robert Harvey*; a deed was obtained by the said *Harvey*, on the 25th of *May*, 1797, from *Jacob Peck* and *Lydia* his wife, (who then were very old,) conveying to himself and his heirs the same one thousand acres of land, described as aforesaid; for and in consideration of the sum of 400*l.* of which he paid 18*l.* in cash; giving his bonds for the balance, payable in four equal instalments. On the same day, by virtue of a *dedimus* previously issued from the Clerk's office of *Botetourt* County, and brought with him by *Harvey* to the place where the deed was executed, *Henry Walker* and *William Anderson*, two Justices of that County certified "that they had examined *Lydia Peck*, privily and apart from her husband, touching the said conveyance; and that she acknowledged the same to *Robert Harvey*, and was willing such her acknowledgment might be recorded in the County Court aforesaid." By a subsequent certificate, dated the 10th of *April*, 1798, the same magistrates stated, that she the said *Lydia Peck*, at the time of such examination, did declare "that she willingly signed and sealed the said indenture, which was then shewn and explained to her." This deed, with the two certificates annexed, was duly recorded. By a writing under seal, bearing date the 27th of *May*, 1797, but appearing in fact to have been executed on the same 25th of *May*, the terms of the contract with *Harvey* were mentioned, and it was agreed that, "if a certain instrument of writing, executed by the said *Lydia* to her son *Jacob*, be of sufficient authority to vest the said one thousand acres of land in the said *Jacob*, then the above contract was to be void, the said deed to be cancelled, *Harvey's* bonds given up, and the eighteen pounds

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in cash repaid him." This writing was attested by the said *William Anderson* and *Henry Walker*. The written instrument referred to, as having been executed by *Lydia Peck*, to her son *Jacob Peck*, was dated *May 11th, 1796*, and signed

her

ELIZABETH X PECK, (Seal.)

mark,

conveying "all and singular her hereditary interest and lawful partition part of and in the personal and real estate of her father *Benjamin Borden*, to her sons *Jacob*, *John*, and *Joseph Peck*, and their heirs and assigns for ever;" the name (ELIZABETH) appearing to have been inserted in the body of the instrument, and also in the signature, by a mistake of the person who drew it.

In *September, 1799*, *Jacob Peck*, sen. and *Lydia* his wife, filed their bill in the late High Court of Chancery, against *Robert Harvey* and *Martha* his wife, suggesting that both the deeds (to *Benjamin Borden*, the younger, in 1745, and to *Robert Harvey* in 1797) were obtained by fraud and imposition; setting forth a variety of circumstances in support of this allegation, against each deed, particularly, that *Harvey* contrived to make the plaintiffs drunk, and obtained the last deeds from them when in a state of intoxication; praying the Court to decree the said deeds to be void and of no effect; that the said *Robert* and *Martha* reconvey the said lands to the plaintiffs; that Commissioners be appointed to allot to them one thousand acres of land lying on the waters of *James River*, according to the will of the said *Benjamin Borden*, the elder, and to put them in possession thereof; that the said Commissioners liquidate and settle the annual profits or issues, and that the said *Robert Harvey* and *Martha* pay the same to the plaintiffs, after deducting the sum of 18*l.* paid as aforesaid by *Harvey*;" concluding with a prayer for general relief.

The defendants by their answer denied the fraudulent practices charged in the bill, and insisted that the first deed, in 1745, had been fairly obtained for a price equal to the value of the land continually exposed to *Indian* depredations. They farther set forth, (among other allegations,) "that the defendant *Robert*, living at a considerable distance from the complainants, and being desirous of avoiding more applications than should be necessary, and, especially after frequent conversations with the complainants on the subject, did, by the advice of his attorney, carry a

deed drawn, and requested two Justices to attend, because he had every reason to expect that the bargain would be concluded, from what had already passed; that he offered, at first, 200*l.* which he conceived was a *liberal* offer, considering that the land had been fairly purchased of the complainants in the year 1745; that he believes that *Jacob* and *Lydia Peck* were both sober at the time of executing the last deed, and thinks he may well make this conclusion from the caution used in obtaining the writing, which he the said defendant signed, containing the reservation aforesaid: that another fact would shew a perfect knowledge in the complainants of what they were doing, and had done; viz. that after the last deed was executed, they came to the town of *Fincastle*, and in the presence of their son *John Peck*, gave up to the defendant *Robert* the bonds taken at the time of the purchase, and took fresh bonds with other security; and that neither they nor their son then uttered any complaint about the said purchase; nor did the latter pretend any claim to the land. The answer concluded with an averment that, if the decree of the Court should be adverse to the defendants, they had not land enough, belonging to the reservation made by *Benjamin Borden*, the elder, out of which to make the allotment required by the complainants.

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The testimony taken in the cause was very voluminous. The depositions of *Peter Holm*, and *Hannah*, his wife, (who was a daughter of the plaintiffs,) were positive in proving the fraud charged in the bill to have been committed by *Harvey*, and the intoxication of the plaintiffs by his procurement. The magistrates, *Walker* and *Anderson*, did not think the plaintiffs were intoxicated at the time of the contract, but mentioned that liquor had been procured. *Walker* swore that, before the business was closed, Mrs. *Holm* was told to make some toddy; and the cup was passed twice, as well as he remembered. *Anderson* recollected seeing *Peck* and his wife drink some liquor at the time the deed was executed; but did not remember whether it was or was not, *mixed with water*; (though he *thought it was*;) nor whether Mrs. *Peck* drank or not before the bargain was concluded: during his stay there, he thought she drank lightly. They both conceived her to have been in her senses when they took her relinquishment. The characters of these two gentlemen were proved to be highly respectable. Sundry depositions were also taken with the view of discrediting *Peter Holm* and wife;



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from which (as well as from her own deposition) it appeared that *she* was induced by a promise of reward from *Harvey* to assist him in making the old people drunk, and persuading them to make the bargain; but nothing was proved against *Peter Holm's* credibility, except that he was occasionally subject to habits of intoxication. The value of the land was proved to be 2,500*l.* or 3,000*l.* in the year 1797; the age of *Jacob Peck* was about one hundred years, and that of *Lydia* upwards of eighty; and both were very *illiterate* as well as *poor*. The witnesses differed in opinion concerning their capacity to make contracts; but the evidence was strong as to the mental imbecility and dotage of *Jacob Peck*.

No evidence appeared to impugn the deed, dated in 1745, except the circumstances herein before expressed. The allegation in the answer, relative to the subsequent exchange of other bonds for those at first given by *Harvey*, was in substance proved.

The suit, having abated by the deaths of the plaintiffs, was revived on behalf of their children; and, on the 26th of *November*, 1804, came on to be heard by the Judge of the Superior Court of Chancery for the *Staunton* District, who decreed "that the plaintiffs repay to the defendant, *Robert Harvey*, the sum of 18*l.* with legal interest thereon from the 27th of *May*, 1797, and restore to him the bonds given for the balance of the purchase-money; that the said defendant deliver up both the deeds in question to be cancelled, and moreover reconvey to the plaintiffs any title which he and the other defendant had acquired, by either of the said deeds, to the lands in the bill mentioned, and pay the plaintiffs the costs of this suit; that certain Commissioners, appointed for that purpose, do ascertain and report to the Court the situation of such lands of *Benjamin Borden*, the elder, as will best answer the description of those devised by him to his five daughters, and whether sufficient of such remain undisposed of to satisfy the claim of the plaintiffs, as representatives of *Lydia Peck*; if not, *who* are in possession of said lands, and by what title they hold them.

From this decree the defendants appealed.

*Peyton Randolph* and *Call*, for the appellants.

*Wickham and Wirt*, for the appellees.

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So much of the argument in this cause as related to the *evidence* need not be inserted. The points in law made on either side were the following:

1. With respect to the deed in 1745, it was contended on the part of the appellants, that no objection on the ground of *fraud* being established; and the price given by *Benjamin Borden*, the younger, not being inadequate, if estimated *at that time* when the land was in possession of the *Indians*; the attempt of the appellees to set aside the last deed was not founded in morality and justice. The Court of *Equity*, therefore, having a discretionary power to give or withhold its aid in such cases, ought not to interfere in their favour; especially considering the acquiescence of the plaintiffs during the great length of time which had elapsed since the date of the first deed.

*In answer to this*, the circumstances, under which that deed was given, the authority and command which *Benjamin Borden* derived from his seniority, executorial office and resources, over the ignorance, confidence, poverty, and dependence of the original plaintiffs, the great advantage which his superior knowledge of the language, the country, its manners and laws, gave him in a bargain with an illiterate foreigner, were relied upon as powerful objections. The price too was *prima facie* inadequate; being only *thirty pounds* for *one thousand acres* of good land! for it does not appear in *evidence*, that the country was in the hands of the *Indians*. The defendant himself does not affirm it positively, but only (by recitation) speaks of his impressions and convictions. Another suspicious circumstance is, that the names of *Jacob* and *Lydia Peck* are signed to the *first* deed; but their *marks* to the *last*.\* If the deed to *Borden*, therefore, had any effect at all; it comes in such a shape, as not to be permitted to stand before a Court of Equity and good conscience. But, in fact, it is a *mere nullity* as to *Lydia Peck*; she being a married woman; and her privy examination and relinquishment not having been taken. There is not a circumstance to shew any equitable or moral obligation upon her to execute that deed; and

\* Note. It was proved that *Jacob Peck* could write; but not that *Lydia* could.

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it must be presumed to have been under the coercion of her husband, without direct evidence to the contrary. Indeed, it may be denied that she ever signed it at all; for the *probate* of a deed said to have been executed by a married woman, without privy examination, is entirely extrajudicial, and proves nothing against her; since, at common law, (independent of our act of Assembly directing the mode of taking her relinquishment,) every deed from a married woman is void.

From Jacob Peck himself, the deed passed nothing, because he was then an *alien*, as is proved by his subsequent bond to make a farther conveyance. An *alien* can purchase land, but cannot hold; and can acquire nothing by act of law.

The length of time is no objection to the claim of the appellees; being repelled by the *coverture* of Lydia Peck, under whom the present plaintiffs claim *ab initio*. Besides, the limitation is not pleaded; nor is *staleness* of the demand insisted on either by *plea*, or *answer*; which is indispensable, that the other party may have an opportunity of accounting for it by a replication: for this reason, it will not do to make the objection by *demurrer*; (a) much less by *argument*.

(a) *Aggas v. Pickersell*, 2 Atk. 225.

In reply, it was contended that, as to Jacob Peck, (though an *alien*,) the deed was *not void*, (even if the land did not pass by it,) but was binding, on his heirs, by his *covenant to warrant* the title; and this whether they received *real assets*, or not. (b) The act of 1785, c. 67. (c) does not affect this case; being altogether *prospective* in its operation.

(b) 2 BL. 302.

(c) 1 Rev. Code, c. 13.

(d) *Edit. of* 1769, p. 479.

But the act of 1766, c. 20. (d) confirmed the deed, and gave it full effect as a *conveyance*. The charge of *fraud* is repelled by Peck's deliberately, on the 19th of May, 1747, confirming the contract made in 1745, by giving a title-bond; and the penalty of that bond, being only *seventy* pounds, evinces that the price of the land, at *thirty* pounds, was not considered inadequate by either party.

2. As to the last deed, the evidence was contradictory with respect to the imbecility of the plaintiffs, and other circumstances. The Chancellor should therefore have directed an *issue* to ascertain the disputed facts.

The Counsel for the appellees observed, *contra*, that this was

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not necessary, where the weight of evidence clearly preponderated on one side, as it did here. The deed to *Harvey* was plainly obtained by *fraud*; 1st. From the *gross inadequacy of price*; the right of *Jacob Peck* to the land being at that time no more than equal to one year's purchase, in consequence of his extreme old age; and *Mrs. Peck's* title being almost a *fee-simple in possession* of a tract of land worth 2,500*l.* or 3,000*l.*; which *Harvey* well knew; for the Court of Appeals in the case of *Harvey and Wife v. Borden*, 2 *Wash.* 156. had, in the fall term of the year 1795, decided the great question; and he was apprized that, when *Jacob Peck* died, he must give up the land. To this circumstance must be ascribed his sudden transition to pretended affection and kindness, after neglecting the old people, in the depth and bitterness of poverty, for so many years, his great anxiety, and urgent persuasions, and contrivances to induce them to conclude the bargain.

In support of this point, as to the effect of gross inadequacy of price, they cited *Grotius*, b. 2. c. 12. *Puffendorf*, b. 5. c. 3. s. 9. *Codex Juris Civilis*, lib. 4. tit. 1. *Pothier on Obl.* p. 34. s. 25. 2 *Bro. Ch. Cases*, 177. note. *Harnie v. Meers*. 7 *Bro. Parl. Cases*, 70. *Filmer v. Gott*. 2 *Vesey*, 549. *Chesterfield v. Janssen*. 1 *Bro. Ch. Cases*, 6—9. *Gwynne v. Heaton*. 2 *Bro. Ch. Cases*, 167. *Heathcote v. Paignon*. 10 *Vesey*, jun. 209. *Underhill v. Horwood*. 3 *P. Wms.* 315. *Pusey v. Desbouvrie*.

2dly. The weakness of intellect of *Peck* and wife, if not in itself, yet coupled with the inadequacy of consideration, was clearly sufficient to vitiate the deed.(a)

3dly. The previous preparation of the deed and commission to take *Mrs. Peck's* relinquishment was another badge of fraud.(b) It is not the usual course, where people deal upon equal terms, to prepare the deed before the contract. This is therefore a strong circumstance shewing *Harvey's* settled determination to get it signed at all events; and a pregnant proof of his own impressions as to the condition of the persons with whom he had to deal.

4thly. Scrupulous concealment of the negotiation from the only habitual counsellors of the old people, their sons; and,

5thly. The false recital in the preamble of the deed that *Jacob and Lydia Peck* had conveyed the land by the deed of 1745, and that the new contract proceeded from their discontent, (occasioned by the rise in the value of the land,) and from *Harvey's* gene-

(a) 2 *Ch. Cases*, 103. *White v. Small*. 2 *P. Wms.* 203. *Clarkson v. Hanway*. 2 *Atk.* 324. *Bennett v. Wade*. 1 *Bro. Ch. Cas.* 560. *Gartside v. Isherwood*. (b) 2 *Ch. Cases*, 103. *White v. Small*.

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(a) 1 P. Wms.  
315. Broderick  
v. Broderick.  
4 Vesey, jun.  
348. Griffen v.  
Nanson.  
Moseley, 364.  
Lansdown v.  
Lansdown. 2  
Atk. 33. Simp-  
son v. Vaug-  
han, and the  
cases there ci-  
ted.

rosity; were additional evidences of fraud. This recital was a deception upon them, and shewed that through ignorance of law they were influenced by erroneous impressions concerning their rights; which circumstance, added to inadequacy of consideration, was enough to set aside the contract. (a)

6thly. The fraudulent artifices used by *Harvey* to make the plaintiffs drunk, and take advantage of their intoxication, were forcibly urged.

*In reply*, it was contended, that *Harvey*, having married a lady, whose ancestor and herself had been in possession of the land more than half a century, by virtue of a deed, and a subsequent bond confirming that deed, was not to blame for wishing to save his wife's inheritance.\* The *first* deed not having been fraudulent, the consideration for the *second* was not inadequate; for Mrs. *Peck* having executed the *first* deed, and knowing that her husband had received the money, was bound in honour and honesty to sign the *second*. Concerning the pretended imbecility of intellect, the testimony is contradictory. The previous preparation of the deed and commission is a very common circumstance, and well accounted for by the answer.

A conclusive circumstance, against the charge of fraud and intoxication, is, that the *Pecks* afterwards ratified the contract, by giving up the bonds to *Harvey*, and taking new ones.

*Thursday, November 29.* The Judges ROANE and FLEMING (Judge TUCKER not sitting in the cause) pronounced their opinions.

Judge ROANE, upon the whole case, was for affirming the Chancellor's decree.

Judge FLEMING. The only material question in this case is, whether the deed from *Jacob Peck* and wife to the appellant *Robert Harvey* was, or was not, fraudulently obtained? In proof of which there are several strong badges and circumstances spread upon the record.

1. The appellant's going to the house of *Peter Holm*, where

\* Note. The second deed was to *Harvey himself*, and his heirs: not to his wife.

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*Peck* and his wife were on a visit to their daughter, with a deed ready prepared, with a commission to take the relinquishment of her right to the land in question; and two magistrates to take her privy examination, before any contract was made, or perhaps treated for.

2. The manifest inadequacy of the *price* of 400*l.* for the land, stated by the depositions to be worth from 2,500 to 3,000 pounds.

3. The extreme old age, weakness and imbecility of *Peck* and his wife; of whom the land was purchased for the above-mentioned trifling sum of 400*l.*; and,

4. The plying the old people (accustomed to intoxication) with ardent spirits, procured from the neighbourhood, by *Harvey* himself; before the business was completed; or, perhaps, before the negotiation had commenced.

An attempt has been made, however, to invalidate the testimony of *Peter Holm* and his wife, by whom the latter circumstance was proved: but their testimony respecting that matter is corroborated by two of the appellant's most respectable witnesses, the magistrates who took the acknowledgment of *Lydia Peck*. *Mr. Walker*, in answer to a question put by the appellant, whether he saw one, or both of them drink freely, said, "I think they drank twice, but I did not discover that they drank deeply;" but they might have drank twice more, or oftener, without his observing them; as I do not suppose he was a spy upon their actions, nor so particular as to notice whether they drank deeply or not; nor do I think it material, as the crime and mischief lay in *Harvey's* having procured the liquor, from the free use of which, it may be fairly presumed, they were under no restraint: and the circumstance of the liquor being sweetened would naturally produce a double effect; first, in disguising its strength; and, secondly, would induce a more free and liberal use of it: and it is in evidence that they were put to bed, on account of intoxication, soon after the business was finished. The evidence of *Peter Holm* and his wife is strongly supported by that of *Walker* and *Anderson*, in another important part of it, which is, that *Lydia Peck* refused her assent to the contract, "or to sign the deed, unless *Harvey* would enter into an article to cancel the bargain, in case an instrument of writing she had executed to her son *Jacob Peck* some time ago was sufficient authority to vest the title of

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said land in him; which the said *Harvey* did, and then she signed the deed." Those are the express words in *Walker's* deposition; and that of *Anderson* is much to the same effect.

I see nothing to lessen the credit of *Peter Holm's* evidence. His deposition consists chiefly in answers to a variety of interrogatories, put to him by the parties, which he seems to have answered with frankness and candour: several of them (had they been answered in the affirmative, would have been much in favour of the appellees) he professed to know nothing about. And when the question following was asked him, "do you remember of hearing the defendant *insisting* on your mother-in-law, *Lydia Peck*, to drink, and how often?" he answered, "I heard him ask her ONCE."

These circumstances in the testimony of *Peter Holm* and his wife, corroborated, in some of its material parts, by that of *Walker* and *Anderson*, two of the appellants' principal witnesses, perfectly establishes its credibility with me. And I have no hesitation in saying that I think the decree a very just one, and therefore concur in the opinion that it be affirmed.

With respect to the decree of *September, 1745*, from *Jacob Peck and wife* to *Benjamin Borden*, it may be observed,

1. That the wife of *Peck*, in right of whom he claimed an interest in the said land, never relinquished her right to the same.
2. Neither *Peck* nor his wife (the latter of whom claimed a right to the 1,000 acres of land, on the waters of *James River*, under the will of *Benjamin Borden*, her father, the locality or identity of which had never been ascertained) were ever seised, or in possession thereof, and therefore could not convey the same to *Benjamin Borden*.

Decree AFFIRMED.

Dangerfield against Rootes, Administrator of Baylor.

Tuesday,  
November 27.

THIS was an appeal granted by a Judge of this Court, under the act passed *January 27, 1810.*(a) from an order of the Superior Court of Chancery for the *Richmond* District, dissolving an injunction, which *John Dangerfield* had obtained to stay proceedings on a judgment confessed by him, at the suit of *Thomas R. Rootes*, administrator of *John Baylor, jun.* deceased, on a bond to the said *Baylor*, in his life-time. Pending the suit on that bond, the appellant, (as alleged in his bill,) for a valuable consideration, purchased of *John Nicholson* several claims which the latter had (in right of his wife) against the said *Baylor*, as executor and devisee of his father, *John Baylor, sen.*, as administrator of his mother, and as executor of his brother, *George Baylor*; but which were much disputed by him in his life-time. Suits in Chancery to recover them had been brought, and by his death had abated.

A debtor ought not to be allowed a set-off (even in equity) for unliquidated and disputed claims against his creditor, purchased by him after *not* brought by the creditor against him.  
(a) *Sessions Acts of 1809*, c. 11. s. 2.

The object of *Dangerfield* in making the purchase was to set off those claims against his own debt then in suit: and, in his bill, he alleged that the claims of *Mrs. Nicholson* were debts of the first dignity against the estate of the said *John Baylor, jun.* a part thereof, viz. a legacy of 300*l.*, being charged on the estate real and personal devised to him by *John Baylor, sen.*; and the residue (as was alleged) due from him as administrator of his mother, and executor of his brother *George*.

ROOTES, the administrator with the will annexed of *John Baylor, jun.* having filed his answer, denying the plaintiff's equity, and insisting that the money due on the bond from *Dangerfield* ought not to be thus intercepted, since he might thereby be compelled to commit a *devastavit*; the Chancellor dissolved the injunction; being of opinion that "it was settled in the case of *Alexander v. Morris and others*, 3 *Call*, 105. to be improper for a debtor, after suit brought, to trump up claims against his creditors, in order to discount them; especially, when purchased at an under rate; and that, if the principle was correct in that case, as between those parties, it should be applied with increased force in this case; since it might have the effect of subjecting the administrator to acts, which, but for that, he might avoid."

Upon a petition for an appeal, it was granted by Judge ROANE,



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for the following reasons assigned by him in his written mandate, addressed to the Clerk of the Court of Chancery: "I am far from being prepared to say that the ground taken by the Chancellor, in dissolving this injunction, is erroneous: yet I think the case deserves deliberate consideration; and, on that ground, I am of opinion to allow the appeal; especially, as the act of Assembly has provided for a *prompt* decision in such cases. The case of *Alexander v. Morris*, 3 Call, 105. has indeed a general *dictum*, seeming to reprobate discounts, 'trumped up,' after the suit has been brought; but that case may have turned upon the extreme (not to say fraudulent) circumstances, under which the discounts in question were acquired; and it is the best and safest rule of interpretation to test a case by the actual circumstances of it. On the other hand, it is held in the case of *Hudson v. Johnson*, 1 Wash. 10. 'that it has been always the practice, and very properly, to allow discounts *up to the time of trial*, but so as *not to destroy the plaintiff's action*, and entitle the defendant to *costs*.' There can be no substantial difference between acquiring the bond of an obligor (after a suit has been brought by him) by a *fair* assignment for valuable consideration, (our act having legalized such acquisitions,) and acquiring his bond, subsequently, for money *lent him*, which would undoubtedly be received as a discount, I presume, under this last decision, with the aforesaid restriction, that the *whole sum* in suit is not to be thereby extinguished, and the plaintiff subjected to *costs*. The decision in this case does not even allow the complainant the benefit of the proffered discount, (if substantiated,) and within the limits of the restriction aforesaid: and any construction upon this point, as *at law*, would seem to hold *à fortiori* in equity; keeping, nevertheless, a steady eye upon the real justice of the case. If, under the *English* statutes upon this subject, it was once held that debts *subsequently* acquired might be set off; (see *Douglas's Reports*, 112. *Reynolds v. Beerling*, in a note;) and it has only been recently decided otherwise in the case of *Evans v. Prosser*, (*Douglas's Additions*, p. 10.) whereby it appears to have been a vexed question in *that country*; it at least deserves consideration whether the *former* principle is not the law in *Virginia*, under the more *latitudinous* words of our act on the subject. Those words are, 'that the defendant shall have liberty *on the trial* to make *all the discount he can* against the debt, and, *on proof*, the same shall be allowed him in Court.'

"On the ground of the doubts entertained in this case, I am of opinion to allow the appeal; the complainant first giving bond and security in the amount of double the debt and interest recovered against him by the judgment which was enjoined.

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*In this Court*, a number of points were made in argument, by *Botts*, for the appellant, and *Call* and *Wickham*, for the appellee; but, as the decision here turned on a *single* point, and the doctrine upon it (with the principal authorities relating to it) is sufficiently expressed in the following opinions of the Judges, the arguments of counsel may with propriety be pretermitted.

*Saturday, December 1.* The Judges pronounced their opinions.

Judge TUCKER, after stating the case, proceeded as follows:

In the case of *White, Whittle & Co. v. Bannister's Ex'rs*, (a) this Court appears to me to have laid down the same doctrine with that expressed in *Alexander v. Morris*, and to have gone the full length of the Chancellor's reasons for the dissolution of this injunction. The case of *Brown's Adm'x v. Garland*, (b) (though an action at *law*,) contains, I apprehend, a direct application of the same principles. These authorities, I conceive, fully support the opinion of the Chancellor; and I will add the strong and pertinent observation of Mr. *Wickham* in his argument, that if set-offs of this kind were encouraged by the countenance and sanction of this Court, a debtor by bond, or other liquidated demand, who was unable or unwilling to pay his debt, when judgment was recovered against him, would be sure to look out for the most complicated and perplexed claim that he could hear of against his creditor, as that would ensure him a respite of ten or twenty years before the claim could be properly liquidated. The only question before the Court being upon the propriety of dissolving the injunction, I am of opinion the Chancellor's decree ought to be affirmed.

(a) 1 Wash.  
166.

(b) 1 Wash.  
231.

I desire to be understood as giving no opinion whatever upon any other point in the cause.

Judge ROANE concurred in dissolving the injunction.

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Judge FLEMING. This case seems to rest upon the single point, whether the appellant has a right to produce the *unestablished* claim (however just) of *Nicholson*, purchased up, for what consideration does not appear, as a set-off against his own bond, long after a suit had been instituted on it?

There are several decisions of this Court which seem expressly against the principle. As *White, Whittle & Co. v. Bannister's Ex'rs and others*. In that case the Court would not allow a judgment against the executors, assigned to the appellants as a set-off against *rent* due to the estate of their testator; because, said the Court, "if creditors, purchasing from the executors, or as in that case, renting an estate from them, should be permitted to bring forth their claims against the testator, in discount, they might thereby not only gain an advantage over other creditors, but the executors might be involved in the trouble of accounting for the assets on every purchase; and in case of mistakes, might subject themselves to a *devastavit*. The objection has additional weight where the plaintiffs purchased up the debt for the purpose of a discount." If, in that case, then, a judgment against the executors was not admitted as a set-off, *a fortiori*, shall an *unestablished* claim (however just it may ultimately prove to be) be disallowed. The cases of *Brown's Adm'x v. Garland and others*, (1 Wash. 221.) and *Alexander v. Morris*, (3 Call, 105.) go to establish the same principle.

The only case I have been able to find which seems to have a contrary tendency, is that of *Hudson v. Johnson*; (1 Wash. 10.) but, when examined, it appears very different from the case before us. There the defendant, on the trial of the issue of payment, produced a receipt from the attorney who prosecuted the suit, dated after its commencement, which receipt was allowed as a discount; the defendant having proved, that on application to the plaintiff to know where his bond was, he replied that it was in possession of *Lewis*, his attorney; but the receipt having been given subsequent to the suit, the Court adjudged to the plaintiff his costs.

I am of opinion that there is no error in the decree before us, dissolving the injunction.

Decree *unanimously* affirmed.

END OF OCTOBER TERM.

(APRIL TERM, 1810, continued from p. 338.)\*

Mayo against Giles's Administrator.

Thursday,  
March 23.

IN the month of *May*, 1793, *John Mayo* obtained an injunction from the County Court of *Henrico*, to stay proceedings on a judgment rendered against him in favour of *Knowles Giles*, assignee of *Fortunatus Sydnor*; setting forth in his bill, that in the year — a certain *Francis Gaddy*, then of the city of *Richmond*, had an account against the complainant for blacksmith's work; that he the complainant was told at several times by *Fortunatus Sydnor* that *Gaddy* was indebted to him, and had instructed him to apply to the complainant for payment; that, not suspecting any fraud, he gave his bond to him the said *Sydnor* for 84*l.* 7*s.* 11*d.*, being the sum then supposed due from the complainant to the said *Gaddy*, without making any deduction on account of an engagement of his to a certain *John Swann* for the payment of a sum of money due from *Gaddy* to *Swann*, the amount of which was then uncertain, and also the value of eleven muskets which had been delivered by the complainant to the said *Gaddy* to clean, and had never been returned; the aggregate amount of which said two articles was to be deducted from the said bond, when the precise sum could be ascertained. In support of this allegation, a written agreement by the said *Sydnor*, bearing even date with the bond, was exhibited.

The bill further stated that *Sydnor*, soon after, assigned the bond to *Giles*; that, "at the time of making the said assignment, the said *Giles* knew the circumstances under which the said bond was granted;" that *Gaddy* refused to grant the complainant an acquittance, (alleging that he had never authorized *Sydnor* to receive the debt,) and forbade him to pay any part of the said bond; that, nevertheless, *Giles* the assignee had brought suit, and recovered a judgment at law.

To this bill *Sydnor* and *Giles* were both made defendants, but no process appears to have issued against the former, and no answer by him was filed. The latter by his answer declared him-

1. Although the assignee of a bond, with, or without notice, takes it subject to all the equity of the obligor, yet such equity must be clearly and manifestly established by proof, before it shall affect an assignee without notice; especially, if the obligor, after the assignment, promises payment of the full amount of the bond to the assignee.

\* See also, on the subject of assignments, *Huckner v. Smith, &c.*, 1 Wash. 299. and *Homes v. Smock, Ibid.* 389.

\* The succeeding nine cases of April Term, by a mistake of the printer, were not inserted in their proper place; but as the reader will find them by the index as easily as if this accident had not happened, it is hoped that no inconvenience will result.

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self a *bona fide* purchaser of the bond, for a valuable consideration, "*expressly denying that, at the time the said bond was assigned to him, or at any time before, he knew of any dispute or fraud being practised by which the complainant was induced or drawn in to execute the said bond.*" He contended, therefore, that, having the *legal right* to the debt, and *equal equity* with the complainant, a court of equity ought not to deprive him of the benefit of his judgment at law.

The testimony in support of the bill consisted, 1. Of *Sydnor's* written agreement dated the 8th of *October*, 1790, in the following words: "Having this day received Colonel *John Mayo's* bond, on account of *Francis Gaddy*, for 84*l.* 7*s.* 11*d.* and there being some doubts with Mr. *Mayo* whether he owes Mr. *Gaddy* that sum or not, I therefore hereby oblige myself, *provided Mr. Mayo, in one month after this date, should produce proper vouchers to satisfy me that he has and is obliged to pay John Swann 13*l.* 15*s.* on account of Mr. Gaddy, independent to an order drawn in favour of John Swann on Mr. Mayo by Mr. Gaddy, and provided Mr. Gaddy should not within one month after date produce to Mr. Mayo eleven muskets which were delivered him to clean, that the price of the said muskets and the 13*l.* 15*s.* shall be fixed to the credit of this bond executed by Mr. Mayo agreeable to the award of Mr. John Hicks, William Booker, William Foushee, and Joseph Higbee.* Witness, my hand, *F. Sydnor.*" 2. A letter from *Sydnor*, dated the 9th of *March*, 1791, mentioning that necessity had compelled him to pass the bond to *Giles*; which he hoped the complainant would not be displeased at; that *Giles* had promised, "if the complainant would fix him upon a certainty of receiving one half the money in a short time, he would wait nine, or perhaps twelve months for the balance;" that should the complainant, on making particular inquiry, find the bond was given for rather too large a sum, the strictest honour should guide him (*Sydnor*) to fix the overplus in his hands to discharge it, as he conceived it not worth while to alter the bond for so small a sum, as perhaps the complainant could rely on his punctuality; and that he "hoped he would accommodate the matter as above proposed." 3. A deposition of a certain *Samuel Jones*, proving a verbal declaration by *Sydnor*, "that he had long been at a loss what to do respecting a bond he had obtained of Colonel *Mayo*, and passed to *Knowles Giles*, who had then sued on said bond, which would probably be carried to a Court

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of Chancery, where he the said *Sydnor* might be placed in a disagreeable predicament, as *Gaddy* had cancelled the bargain by which he obtained the bond;" that he had previously contracted with *Gaddy* for the sale of part of a lot in the City of *Richmond*, and that by selling the same ground to the said *Jones*, he should "destroy the foundation of his claim against *Gaddy*, which had been his justification in the receipt of said bond; but, as he should never be able to get any thing out of *Gaddy*, he had determined to sell, and execute a deed for, the ground, to *Jones*; which he proceeded to do."

On the other side, the deposition of *Alexander King* proved a promise by *Mayo*, (when applied to, by the deponent, on behalf of *Giles*, for payment of the bond,) that he would pay "*the amount of the bond to Giles.*" The judgment at law was by confession; and, "by consent of the parties, fourteen days were allowed the complainant to file his bill of injunction in the Clerk's office."

In *August*, 1793, a motion to dissolve the injunction was overruled; and in *November*, 1796, *Giles* having died, the suit was revived against his administrator. *May* 8th, 1800, the cause came on, by consent of parties, to be heard in chief, when the injunction was dissolved, and the bill dismissed with costs. On an appeal to the Superior Court of Chancery, this decree was affirmed by the late Chancellor, *Wythe*; and thereupon *Mayo* appealed to this Court.

*April* 21st, 1810. The Judges delivered their opinions.

Judge TUCKER, (after stating the case.) The original agreement between *Mayo* and *Sydnor*, referred to in the bill, whereby it was stipulated that, if *Gaddy* did not within one month produce the eleven muskets delivered him to clean, that *Mayo* should have credit for their value, is an admission on the part of *Sydnor* that *Mayo* should not be driven to his action to obtain compensation for them, if not delivered, but that the value thereof should be admitted as an equitable discount, or set-off against the bond. I call it an equitable discount, because I do not know in what manner he could have had the benefit of it at law; the value of the muskets not being ascertained in the agreement. And indeed, the parties seem to have admitted this, the one

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by confessing a judgment on the bond, and the other by consenting that the former should be allowed fourteen days to file his bill of injunction in the Clerk's office. But, were it not so, the circumstances of fraud and imposition, charged in the bill, in my opinion, are amply sufficient to give jurisdiction to the Court of Chancery, in this case: nor could a demurrer, for want of equity, hold.

As to the merits. In the case of *Norton v. Rose*, (1 Wash. 233.) it was the unanimous opinion of the Court, (in the absence of Judge PENDLETON and Judge FLEMING,) that an assignee of a bond or obligation takes the same subject to ALL THE equity of the obligor; and this, as I understand the Judges, whether the assignee at the time of the assignment have notice of such equity, or not. The question appears to have been fully discussed both by the bar, and by the bench, and therefore ought not now to be disturbed. But I am so far from feeling a disposition to do so, that I accord entirely with the opinions thus delivered. The only question, then, is, has the appellant brought his case within the rule as there laid down? From the agreement, as before stated, and a letter of March 9, 1791, from *Sydnor* to *Mayo*, and the deposition of *Samuel Jones*, I am very much disposed to believe that Mr. *Mayo* was probably entitled to the relief he seeks.

But the whole, taken together, does not in my opinion support the allegations of his bill. Why no process was ever issued against *Sydnor*, to compel him to answer the charges against him; or why *Gaddy* was neither made a party, nor a witness in the causes, it is impossible for this Court to discover. While I feel from the evidence before me a strong suspicion that other and better evidence might have been adduced, in support of the bill, I am constrained to say that the appellant has not proved his case, as alleged in the bill, or as it appears probable from some parts of *Samuel Jones's* deposition. I therefore think the decree must be affirmed. But I conceive it ought to be, without prejudice to any future bill against *Sydnor* which he may be advised to bring for relief on this subject. It would indeed be my wish only to affirm so much of the decree as dissolves the injunction, and allows the appellee to take the benefit of his judgment at law, and remand the cause for further proceedings, if the plaintiff should be so advised. But I doubt the power of this Court to make such a decree where the cause, with all its imperfections,

on the part of the plaintiff, upon its head, after being in Court full seven years, was brought on by consent of parties, to be heard in chief upon the bill, answer, exhibits and depositions, in this record.

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In the opinion I have given I mean not, in the most distant manner, to disturb or weaken the principles established in the case of *Norton v. Rose*, in which I most heartily concur.

Judge ROANE concurred in affirming the decree.

Judge FLEMING was of the same opinion; observing, that, whatever equity Mayo might have against *Sydnor*, he had none against *Giles*, who was a fair purchaser of the bond, and to whom Mayo had made a promise of payment.

Decree unanimously AFFIRMED.



Wyatt against Sadler's Heirs.

Friday, April  
27.

ON the trial of an action of ejectment, in the District Court of King and Queen, (on behalf of John Den, lessee of Richard Wyatt, against the widow and heirs of John Sadler, deceased,) the lessor of the plaintiff proved that he was the eldest son of Richard Wyatt, who died in the year 1768, seised in fee of the land in the declaration mentioned; that, being so seised, the said Richard Wyatt, the elder, had made and published his last will; in which were the following clauses, after the usual preamble; viz. "and, as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth: Item, my will and desire is, that my beloved wife Elizabeth Wyatt shall have and enjoy all my land during her natural life. Item, after the decease of my wife, I give and bequeath to my sons Richard

1. In construing wills, the cardinal rule is to collect the intention of the testator from the whole will taken together, without regard to anything technical, or any particular form of words; and if such intention be lawful, (as not creating perpetuities, or the like,) full effect ought to be given to it by the Courts.

2. A testator (who died in the year 1768) expressed himself, in the introductory part of his will thus: "and as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth." In the next clause, he "wills and desires that his wife should enjoy all his land during her life, and after her decease gives and bequeaths to his two sons, all his land, to be equally divided between them; his still, likewise, to be between them, to distil for their own use, and after, to his eldest son." A fee-simple estate in his share of the land passed to the younger son.



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and *William Wyatt*, all my land, to be equally divided between them, *Dragon Swamp* and all, my still, likewise, to be between them, to distil for them for their own use, and *after*, to my son *Richard*. Item, my will and desire is, that my lot at *West Point* shall be sold, and Mr. *Stephen Bingham* to have the refusal of it." There were other bequests of personal estate, &c. The lessor of the plaintiff farther proved that *William Wyatt*, the younger son of said testator, departed this life a year or two before the institution of this ejectment; that the widow was also dead at the time of bringing the said ejectment; and the defendants, claiming under the said *William Wyatt* the land in the declaration mentioned, which had been allotted to him on partition made between *Richard* and him, moved the Court to instruct the Jury that, under the said will, a fee passed to *William*, on the death of the widow, in that part of the land devised to him; which the Court accordingly did; to which opinion of the Court the plaintiff filed a bill of exceptions. Verdict and judgment for the appellants; and appeal.

*Wickham*, for the appellant. The abstract question submitted by this record is, whether a fee passed to *William Wyatt* under a will, in which there are no words of perpetuity, and no residuary clause. This depends upon authority; and certainly, according to the old adjudications, the remainder to *Richard* and *William* was for life only; the reversion in fee vesting in *Richard*, as heir at law. None of the modern precedents have gone so far as to make a devise like this carry a fee. In *Davies v. Miller*, (a) the word *estate* was transposed from different parts of the will, and coupled with the devise, so as to give a fee: but here the word "*estate*" is not used; but "*goods*" only.

(a) 1 Call,  
127.

*Warden*, contra, relied on *Davies v. Miller* as an authority in point. The words "as to *what worldly goods*," &c. coupled with the clause immediately ensuing, in which *lands* are devised, evidently shew that the testator meant the same thing as if he had said "*all my estate*." From the whole will, it is clear, that he did not intend to die intestate as to any part of his property.

*Wirt*, on the same side, quoted 8 *Viner*, 208. pl. 23. 1 *Swin-*

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(a) 1 *Wash.*  
102, 103.

burne, 368. *Powell's note.* Judge PENDLETON, in delivering the opinion of the Court, in *Kennon v. M<sup>r</sup>Robert*, (a) says, "that the intention of the testator is to give the rule of construction, is declared by all the Judges both ancient and modern. He afterwards quotes Lord Mansfield's observation in the case of *Mudge v. Blight*, (*Cowp. Rep.* 352.) "that he verily believed that every case determined upon the rule of law, directing an estate for life, if there be no limitation, defeats the intention of the testator." It is surprising that, impressed with this conviction, his Lordship did not at once change the last-mentioned rule, as "rigid and unjust," and conflicting with the "true rule built upon intention;" instead of which he caught hold of little words, such as "estate" and the like, which word "estate" is said by Judge PENDLETON to have been "pressed" into the service. In 1 *Roll. Abr.* 834. l. 30. the words "my whole estate," in 3 *P. Wms.* 295. (*Tanner v. Wise*), and 3 *Call*, 306. (*Watson v. Powell*), "all my temporal estate," in 2 *Vern.* 690. (*Beachcroft v. Beachcroft*), *Lutw.* 36. 136. *Cas. temp. Talb.* 160. "all my worldly estate," and in 1 *Call*, 127. (*Davies v. Miller*), "my estate," were deemed sufficient for the purpose.

It is contended by Mr. Wickham, that the cabalistic word "estate" is all-important and indispensable: but in 7 *Bro. Parl. Cas.* 467. (*Jackson v. Hogan*), the words "as to my worldly substance," in the preamble, and "all the remainder and residue of all the effects, both real and personal, which I shall die possessed of," in the residuary clause, and, in 1 *Bro. Ch. Cas.* 437. (*Huxlop v. Brooman*), "all I am worth," were severally determined to pass a fee. In the present case, the testator was unlearned in law, as appears from his using the terms "give" and "bequeath" (which are appropriate to personal estate) in disposing of his lands. His will should, therefore, be the more liberally expounded.

It has been decided that when personal estate and real are given in the same clause, the real shall pass as absolutely as the personal. (b) The relation, too, in which the testator stood to the parties, and the existing circumstances of the case, ought to affect the construction. (c) The wife in this case may have been young; and a remainder for life only, could have been of little value to the sons.

(b) 3 *Burr.*  
1881. *Rose v. Hill.*

(c) 3 *P. Wms.*  
194. *Newland v. Shephard.*  
*Amb.* 387. *Peat v. Powell.*

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*Wickham*, in reply, admitted the testator meant to give a fee. Indeed, he would go farther, and admit that, since the first settlement of *Virginia* to this day, whenever a man gave land, he meant to pass the whole estate. There is, *in reason*, no distinction between a gift of *land* and a gift of a *horse*. Yet the *law* requires a different mode of transfer, and the testator's intention must give way to the law: this is a subject of *positive institution*. Thus, if a man make a *nuncupative* will, and give personal estate and *land*, the land will not pass. We are only to inquire, then, whether it had become a *rule of property*, before the act of 1785, (a) that, if a testator did not use words of perpetuity, a fee would not pass. If so, the rule ought to be abided by; however unreasonable it may appear; for to depart from it would be as contrary to *policy* as to *law*; since the titles to many estates in this country would be shaken by such a decision as is now contended for.

(a) 1 Rev.  
Code, p. 159.  
a. 12. 1785, c.  
62.

The later authorities have gone so far as to determine that the word "*estate*," or words *equivalent* thereto, such as "*all I am worth*," and *the like*, may carry a fee. The word "*estate*" has a very extensive meaning, as conveying the *whole interest* of the testator; and words of the same import have been permitted to have the same effect.

Thus far the decisions have gone, and no farther. The words "*worldly goods*" are only descriptive of the *kind of property*, not of the *quantity* of interest; and such words have never been allowed to carry a fee. In *Jackson v. Hogan*, 7 Bro. Parl. Cas. 467. the word "*effects*," being in a *residuary* clause, and coupled with other strong expressions, such as "*all the remainder and residue*," and "*real and personal*," were supposed to relate to the *totality of estate*. But this will not warrant the position that "*effects*," or "*goods*," in an *introductory clause*, can be connected with a devising clause so as to enlarge a *life-estate*, in *lands* into a *fee-simple*.

Mr. *Wirt's* observation that, when *personal* and *real estate* are given in the same clause, the *real* shall pass *as absolutely as the personal*, does not apply in his favour; for the only bequest of personal property which has any connection with the devise of the lands in this case, is that relative to the *still*; a share in which is given to *William for life only*.

*Wirt.* The testator's disposal of the *still* certainly furnishes a strong argument to prove that he supposed that he had used words sufficiently strong to give an absolute estate in his lands; for recollecting that favourite object (*the still*) was incapable of partition, he gives it to his eldest son, after the death of *William*; which shews that had he intended his lands to go to the same son, he would have said so.

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*May 9, 1810.* The Judges delivered their opinions.

Judge TUCKER, (after stating the case.) Mr. *Wickham*, for the appellant, admitted that it was the *probable*, and even *apparent* intention of the testator to give his two sons an equality of estate as well as an equal quantity in his lands: but contended that no estate in fee-simple could pass, even by a will, without words of inheritance, or of perpetuity, or such expressions as were descriptive of the testator's *whole estate* in the lands. Mr. *Wirt*, on the other hand, insisted, that, where no particular estate is limited by the words of the will, the testator's intention shall prevail. The case was very ably argued on both sides, and I felt myself much obliged to the counsel for their assistance.

The subject of testamentary dispositions of land received in this Court, in the celebrated case of *Kennon v. M<sup>r</sup> Robert and Wife*, as full and elaborate a discussion from the bar (as I have been informed) as ever any cause had in any Court. The clear, lucid, and comprehensive view, of the subject generally, taken by the justly celebrated President PENDLETON, in the opinion which he delivered as the resolution of the Court, points out, in my opinion, the polar star by which Courts in future ought, in all cases, to be guided and directed. He has clearly and demonstratively shewn that there are no precise words, no precise arrangement of them, nor any thing in any degree *technical*, necessary to the discovery of the testator's real and legal intention. He has convicted those, who have contended for such precision and technicality, of inconsistency and contradiction, and has demonstrated (to my satisfaction at least) that, whenever from the whole face and context of the will, we can collect the testator's intention, we are bound to give it effect.(a)

(a) 7 *Brown's*  
*Parl. Cases*,  
467. *Jackson*

*v. Hogan. Crap. 299. S. C. 1 Bro. Ch Rep 437. 3 Burr. 1881. 3 P. Wms. 295. 2 P. Wms. 194. Ferr. 160. Amb. 387. 1 Call, 127. 3 Call, 306. 2 Vern. 690.*

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In the present case, I am fully satisfied that the testator meant to dispose of the whole *estate*. And that under the words *WORLDLY GOODS*, he meant to include his *lands*, and his *estate* therein. The next sentence, after that in which these words occur, contains the disposition of *ALL his LANDS* to his wife, for life: she might (as was suggested in the argument) have been young, and a *remainder for life only* of very little value to his sons. The emphatical words that after her death *all his lands* should be *equally divided* between his *heir* and his second son, *DRAGON SWAMP* and *ALL*, impress me with the idea, that he thought these words sufficient to shew they were to have *equal estates*, as well as *equal quantities* in the land. The clause respecting the still (as was very pertinently and forcibly observed by the counsel) shews he recollected that favourite object was incapable of *partition*: he therefore gives it to the eldest son whenever their joint interest in it should cease. Had he intended the lands also to go to the same son, he would have said so.

There is one reason, which does not exist in *England*, why the intention of the testator in the distribution of his lands among his children ought to be referred to an estate of inheritance, unless the *contrary* intention manifestly appear. It is, that lands were the property most *easily* acquired in *this country*, as well as most necessary to the support of a family. A father, often, had nothing else to give. In distributing it, he must be presumed to do a father's part among his children by giving an estate of inheritance.

I therefore think the judgment ought to be affirmed.

(a) 1 Wash.  
109.

Judge ROANE. In the case of *Kannon v. M<sup>r</sup>Robert*, (a) the Court, after discussing much at large the question whether the word "*estate*" could be transposed from the introductory part of a will, to the devising part, so as to enlarge the interest devised from a life estate into a fee, left that question, *expressly*, undecided. It did so, although it expressed a strong *affirmative* opinion upon the question; because the case could well go off upon another point, and in deference to the cases of *Mitchell v. Sidebotham*, (b) *Den v. Gaskin*, (c) and *Wright v. Wright*, (d) in which contrary decisions had been rendered. To these last cases might have been added (*inter alia*) those of *Shaw v. Russel*, (cited in *Den v. Gaskin*,) *Loveacres v. Blight*, (e) and *Hogan v. Jackson*. (f) All of these cases seem to have esta-

(b) Doug.

760.

(c) Cowp. 670.

(d) 1 Wilson,

414.

(e) Doug.

354.

(f) Cowp.

304.

blished the position beyond a doubt, that such introductory words, alone, are not sufficient; though the last-mentioned case very properly admits, that they may be resorted to as a help to guide the judgment of the Court, in relation to the words contained in the devise itself. The opinion of the Court on this point, as expressed in the case of *Kennon v. M<sup>r</sup>Robert*, seems to have been grounded upon the three cases of *Tanner v. Wise*, (a) *Ibbetson v. Beckwith*, (b) and *Grayson v. Atkinson*. (c) A reference to the two former cases will shew that there were words also in the body of the respective devises, in aid of which the introductory words were used; and thus the decisions on them are perhaps to be reconciled to the distinction taken as above, in the case of *Hogan v. Jackson*: and, with respect to the last case, if the words in the body of the will "all the REST of my goods, lands," &c. do not shew it to be of the same character, the introductory words are unusually strong to import an intention to dispose of all the testator's temporal estates; in which respect the preamble before us (it will presently be remarked) is different. That case of *Grayson v. Atkinson* is, therefore, perhaps, the only case that can be found (or was relied on by the Court) to justify the construction of a fee, from the words of the preamble of a will, without words of similar import, in the body thereof, to aid which the introductory words are to be used. The weight of the *English* cases, therefore, undoubtedly is against the position that introductory words, alone, are competent to operate an enlargement into a fee. The opinion in the case of *Kennon v. M<sup>r</sup>Robert* has, however, been since admitted, and acted upon by this Court; and it has now grown into a rule of property, (not to be departed from,) that the word "estate," alone, in the preamble of a will, is sufficient. The cases of *Davies v. Miller*, (d) and *Watson v. Powell*, (e) have been decided conformably thereto; though, in the former, the word "estate" is also found in the conclusion of the will, and was relied on by the Court as aiding the preamble. In all those cases, however, the word "estate" was found in the introduction: there was no opinion given in relation to words of an inferior character. That was the ultimatum of those cases; and, if we go beyond it, and are satisfied with terms short of that, we do not stand upon the authority of that decision. The most that can be contended for, in favour of that decision, is, that it has exalted the introductory words of a will to the level of the devising part: that case, how-

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(a) 3 P.Wms.  
205.  
(b) Cases  
temp. Talb.  
157.  
(c) 1 Wilb.  
133.

(d) 1 Call,  
127.  
(e) 3 Call,  
306.

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ever, cannot be construed to have decided, that words contained in the *preamble* of a will *shall* carry a fee, which words in the *devising part* thereof would be *insufficient* to produce that effect. That is going a grade farther than was necessary in that case; for the word "*estate*," if found in the *devising* clause, would have been sufficient. Whenever such a position shall be established, it will not only prostrate one of the best settled rules for the construction of wills, but also lead to the absurdity of supposing that the intention of the testator is to be better collected from the preamble of the will (which, in general, contains nothing more than the formulary expressions of the scrivener) than from the text of the will itself; and that *slighter* expressions would do in the former than in the latter.

Taking the preamble of the will, therefore, to be of *equal* dignity with the body of the will itself, and *not of greater*; while it is admitted that any words, however irregular, importing a devise of an inheritance, will carry a fee, it is also true that, if such words are wholly wanting, nothing but a life estate passes. There is no position of the law better established than this; and this rule is not in the smallest degree impugned by any of the decisions of this Court. This position results from the nature of

(a) *Cump.* 90.  
304.

a will, which is only considered as a species of *conveyance*; (a) and as words of inheritance are indispensable in conveyances at the common law, so they are necessary, by analogy, in the case of wills, although in favour of the *intention* of the testator (and because he is supposed to be *inops consilii*) any equipollent words, however irregular, are received. Thus it is held that "all my *estate*," or "all my *interest*," will do; but that "all my *lands*

(p) *Doug.*  
670.

at *A.*" will not. (b) The former will suffice, because they import the *quantity of interest* conveyed; for an "*estate*" is defined to

(c) *Bl. Com.*  
103.  
*Doug.*  
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mean "such *interest* in lands as the tenant hath therein;" (c) whereas the term "land" only imports the *thing*, or the specific property devised. In making this construction, it is also held that we must have resort to the *words* of the will itself, however irregular; and there must be no doubt, upon those words, taken in a general view, that a fee was intended; or else the rule

(d) *Doug.*  
354.  
*Cump.*  
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of law must prevail. (d) It must prevail, (and has been so decided in numberless cases,) although it is at the same time admitted by the Judges, that that rule, in many cases, thwarts the intention of the testator, as ordinary men do not distinguish be-

tween the gift of a tract of *land* and that of a *horse*: (a) it must also prevail in cases where the descent of the land to the heir seems even reprobated by leaving him a disinheriting legacy of a shilling, or the like. (b) The *general* intention inferible from the consideration just mentioned is not competent to operate the enlargement: we must look for it in the *words* of the will; and if the intention of the testator shall chance (in any case) to be thwarted, it is (to use the language of Lord Mansfield) because "*quod voluit non dixit.*"

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(a) Doug.  
670. Corp.  
304. 657.  
(b) Corp.  
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In the case before us, the words of the introduction are, "as to *what* worldly goods it has pleased God to give me, I leave and bequeath as follows." There are no words here descriptive of the testator's *interest* in the *lands* in question; nor does he say that he means to *dispose* of *all* his worldly goods, and much less all his *interest therein*. He only says that, *with respect* to his worldly goods, he means to devise so and so: and these words would have been still proper, had the testator only disposed of *half* his estate, or of his *lands only*. These are the sentiments of Lord Mansfield, in relation to the introductory words in the will, in *Den v. Gaskin*; words which are similar to, but stronger, at the same time, than those before us. I will not say, however, but that this criticism upon the introductory words, which is entirely proper under the point of view in which such words are held in *England*, may be less proper under the decisions of this Court, as aforesaid, by which the character of such words seems changed and exalted, and they are placed, as it were, upon a level with the devising words themselves: on this point, however, I give no opinion, because the words in the preamble now in question stop short of the *desideratum* required, and do not import the quantity of interest the testator professed to devise.

The case before us is, then, a naked one. The introductory part of the will is short of the standard required by the decisions of the Court, and receives no aid from the body of the will itself. Neither can such aid be found in the *general consideration* before stated. This is admitted by the Court in the said case of *Kennon v. M'Robert*. In that case the Court disclaimed the power to *change* the law, whatever its opinion might have been *touching the rule in question*, considered as a *new* case; admitted, that it was to be governed by *precedents*; agreed, that cases prior to *January, 1787*, (when the common law rule concerning con-



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veyances was changed by an act of the legislature,) must be settled by the decisions of that time; and admitted, that the intention of the testator (which it also decides is to be collected from the will itself) must not prevail against the settled rules of construction.

As well, therefore, on the ground of the principles declared by the Court in the said case of *Kennon v. M'Robert*, as of those precedents by which the Court professed in that case to be governed, I have no hesitation in saying that only an estate for life passed in the estate before us, and that the judgment of the District Court is erroneous, and ought to be reversed. A contrary decision in this case (considering that almost all wills have these formulary words of introduction in them) would go the length of repealing the rule aforesaid altogether, in relation to these testamentary conveyances; and that by the mere power of the Court, when the power of the Legislature only was deemed competent to make the change in relation to their prototype, (common law conveyances,) and was exercised prospectively only, (from the 1st of January, 1787,) leaving all prior conveyances to stand by the rules antecedently established; as the Court, (in the case of *Kennon v. M'Robert*.) has also expressly held, as aforesaid, should be the case in relation to wills prior to the period aforesaid. That case itself, therefore, seems to me a conclusive authority in favour of a reversal in the present instance.

Judge FLEMING stated the case, and proceeded as follows. The only question is, whether *William Wyatt* (the younger son) took an estate in fee, or for life only, in the lands bequeathed to him?

Under the feudal system in England an arrangement was made of the various tenures by which lands were to be holden. It was natural to suppose that technical forms would not always be attended to; and hence it became necessary to provide a rule for cases where the duration of the estate was not described. The rule under the feudal system was, that conveyances of an estate in land, without words of inheritance or limitation, passed only an estate for life.

After the statutes of the 32d and 34th of *Henry VIII.* a more liberal construction, and extensive latitude has been allowed, in the construction of wills respecting lands, than in conveyances

by deed; on account of the former being often made in extremity, where counsel, skilled in the technical terms of the law, were not to be had: and, therefore, the intention of the testator is to prevail in every case where it does not contravene some known and established rule of law.

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Lord *Holt*, and other Judges in more modern times, emphatically call that *intention* the *polar star* by which our decision is to be guided. And Justice *Buller*, in delivering his opinion in the case of *Hodgson v. Ambrose, Douglas*, 341. noticed what Lord *Hardwicke* truly said, in *Bagshaw v. Spencer*, 1 *Vez.* 142. 2 *Atk.* 577. "there can be no magic or particular force in certain words, more than others; their operation must arise from the sense they carry." And, he added, "I say, *that* sense can only be found by considering the whole will together. That is the first and great rule in the exposition of all wills; and it is a rule to which all others must bend. It says, '*if not inconsistent with the rules of law*:' but it must be remembered that those words are applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words. A man cannot, by will, create a perpetuity, put the freehold in abeyance, nor limit a fee upon a fee, &c. But the question whether the *intention* be consistent with the rules of law, or not, can never arise till it is settled what the intention was; and, if it be apparent, I know of no case that says a strict legal construction, or a technical sense of any words whatever, shall prevail against it." Nor, in my apprehension, shall the *want of a technical word* frustrate the *intention* of a testator, where it is apparent upon the face of the whole will taken together.

Lord *Mansfield*, in the case of *Mudge v. Blight, Cowper*, 355. after noticing that, at common law, a deed, without words of *limitation*, conveys to the donee only an estate for life, adds, "but I really believe that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator. Notwithstanding this, where there are no words of limitation, the Court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life. But, as this rule of law has the effect I have just mentioned, in defeating the intention of the testator, in almost every case that occurs, the Court has laid hold of the generality of other expressions in a will, where *any* such can be found, to take the devise

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out of this rule. Therefore, if a man says 'I give all my *estate*;' that has been construed to pass a fee: or even if words of locality are added as 'all my estate at A.' it has been held that the whole of the testator's interest in such particular lands will pass, though no words of limitation are added. 2 P. Wms. 524. So in the case of *Hogan v. Jackson*, from Ireland, the Court had no difficulty in saying that the words 'all my *wordly substance*,' in the introductory part of the will, meant every thing the testator had, and that the words *all his real effects*, in the subsequent residuary devise, were equivalent to *wordly substance*, and carried every thing to the residuary devisee. In general," (adds Lord Mansfield,) "wherever there are words and expressions, either general or particular, or clauses in a will, which the Court can lay hold of, to enlarge the estate of a devisee, they will do so, to effectuate the intention. But, if the intention of the testator is *doubtful*, the rule of law must take place."

In the case before us, I have no doubt but the intention of the testator was to pass a fee to both his sons. First, because in the introductory part of the will he uses this expression; "and as to what *wordly goods* it hath pleased God to give me, I leave and bequeath as followeth;" and immediately proceeds to dispose of his *lands*, in the first clause of his will; manifesting thereby his idea that the words *wordly goods*, comprehended all his worldly possessions, and were tantamount to the words *all his worldly estate*; and it seems agreed on all hands, that, had he used the word *estate*, instead of *goods*, a fee would have passed to his son William; (see *Davies v. Miller*, 1 Call, 127. and *Watson v. Powell*, 3 Call, 306.) and, to my mind, the latter was as expressive of his intention as the former would have been. We frequently find men, who are unacquainted with the technical terms of the law, using the word *goods*, to signify *estate*; a recent instance has occurred, during the present term of this Court, in the will of William Murray, in the preamble of which he expressed his intention of disposing of all his *wordly goods*, and immediately proceeded to bequeath (not devise) his lands. In the case before us, the testator, after giving his wife a life in his lands, adds, "Item, after the decease of my wife, I give and bequeath to my sons Richard and William Wyatt all my land, to be equally divided between them, Dragon Swamp and all," manifesting thereby, in my apprehension, his intention that his sons should

be *equal*, not only respecting the quantity, but also the *interest* they were to enjoy in his lands; which was an absolute fee. He then directs his *still*, likewise, to be between them, for their own use, and after, to his son *Richard*; that being an article, which, if divided, would be rendered useless to both sons.

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On this view of the case, even from the *English* authorities, it appears to me that *William Wyatt* took a fee in the lands bequeathed to him by his father's will; but, if not, the case of *Kennon v. M<sup>r</sup>Robert*, in this Court, and the subsequent cases of *Davies v. Miller*, and *Watson v. Powell*, seem to have put it beyond a doubt. I am therefore of opinion, that the judgment of the District Court ought to be affirmed.

By a majority of the Court, the judgment was AFFIRMED.

Johnson and others *against* Johnson's Widow and Heirs. Wednesday,  
May 9.

THIS was a suit in Chancery in the County Court of *Southampton*, by the widow and children of *Robert Johnson* the younger, against *Edmund Johnson*, grandson, and heir at law of *Robert Johnson* the elder, and *Joseph* and *Lemuel Jones*, purchasers from the said *Edmund*, to recover of them a tract of land devised to *Robert Johnson* the younger, by the will of the said *Robert* the elder, bearing date *September 4, 1772*, and admitted to record the 12th of the same month.

1. A fee-simple estate in lands might pass by a will (even before the act of 1785, c. 62.) without words of perpetuity, or any words equivalent; provided it appeared, from the whole will taken together, that such was the intention of the testator.

The clauses on which the controversy turned were, "I gave and because to my son *Robert Johnson*, 120 acres of land that I bought of *James Kitchen*, and 1 cow and 1 calf," &c. proceeding to mention several other articles of personal property. "I give and because to my grandson *Edmund Johnson*, 5s. I give and because all the rest of my worldly estate to my well beloved wife *Martha Johnson*, to be at her disposal during her life or widowhood, and afterwards to my son *Britain Johnson*, to him for ever."

2. Where an illiterate testator uses the same words in disposing of his real, as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property.

The bill set forth that, although there are no words of perpetuity in the devise of the land to *Robert* the younger, the plaintiffs could prove that the testator, at the time of making the will, told *Joseph Bradshaw*, the writer thereof, to give the said 120

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acres of land to his son *Robert*, and his heirs; and this, they contended, was strongly corroborated by every devise and bequest contained in the will. They prayed a decree for the land, (as being entitled under *Robert* the younger, he having died intestate,) and for *general relief*.

The defendants relied on their construction of the will, as giving to *Robert* the younger, an estate for *life only*, and, immediately upon the death of the testator, the reversion in fee to *Edmund Johnson*, his heir at law. They denied any knowledge of the testimony of *Joseph Bradshaw*, but believed that, even if it were as stated by the plaintiff, the Court should disregard it.

The only depositions taken were those of *Council Johnson* and *Sarah Johnson*, proving declarations by the testator some time previous to his death, that he intended to have his will altered, and give the plantation that he bought of *James Kitchen*, to his son *Robert Johnson*, jun.

The County Court decreed the land to the plaintiffs, and, on an appeal to the Superior Court of Chancery for the *Williamsburg* District, Chancellor TYLER was of opinion, "that, upon a fair construction of the will of *Robert Johnson* the elder, it was his intention that *Robert Johnson* the younger, his eldest son then living, should have an absolute interest in the tract of land devised to him, in the same manner as he intended the said *Robert* should enjoy the *personal* property devised to him in the same clause wherein the land is devised;" and that there was no error in the said decree, except that the County Court should have decreed the dower of the appellee *Mary*, in the said land, to be assigned to her; partition of the said land (subject to the said dower) to be made among the children of the said *Robert Johnson* the younger; and an account to be taken of the rents and profits of the said land whilst in the possession of the appellants. He therefore affirmed the decree as far as it went, and remanded the cause for farther proceedings; from which decree an appeal was taken to this Court.

*Call*, for the appellant, made two points; 1. A *life-estate only* passed to *Robert Johnson* the younger. This is a mere naked case of a devise of land to a son, (not being heir at law,) without any words of perpetuity, and without any words in the preamble to supply their place. None of the cases come up to this. It

may, perhaps, be said the residuary clause makes a difference; but that would not benefit the plaintiffs, because they are not entitled under it.

2. The Court of *Chancery* had no jurisdiction; (unless as to the dower of the widow,) because the remedy was complete at law.

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*Wickham*, contra. The case of *Wyatt v. Sadler*, (a) is decisive of this, on the merits; establishing the great rule that the testator's intention ought to prevail. Here the testator was a very illiterate man, altogether unacquainted with law or with technical terms. His giving *real* and *personal* property in the same clause, and by the same words, clearly proves that he knew no difference between them, but intended an equally absolute estate in both; and his bequeathing *five shillings* to his heir at law shews that was all he meant to give him. But the residuary clause is decisive to shew that he thought he had given all his estate in the land in the foregoing part of the will. It is not probable that he contemplated giving his wife a remainder for life after an estate for life to his son.

As to the jurisdiction. The widow and infant children join in the suit. She is clearly entitled to *dower*. There being, then, no exception to the jurisdiction, the Court, having it for part, will entertain it for the whole.

*Call*, in reply. The circumstance of real and personal estate being joined in the same clause makes no difference; for in the case of *Forth v. Chapman*, (b) recognised in *Hill v. Burrow*, (c) it was decided that the same words, as to the two different kinds of property, should be taken in different senses, though occurring in the same clause.

The testator's giving his heir at law five shillings, does not prove that he meant to give the more to the other devisee.

But the residuary clause is said to be decisive. Be it so. Then the appellees are not entitled; but the testator's widow, in whom the reversion in fee vested by that clause. It is contended to be *improbable* that he intended this. The same argument was used and overruled in *Selden v. King*, (d) But in *Ken-  
son v. M'Robert*, this Court expressly decided that, where there

(a) 1 P.Wms.  
663.  
(c) 3 Call,  
342.

(d) 2 Call, 72

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is any other estate for the residuary clause to operate upon, it will not carry the estate from ~~the~~ *heir at law*.

Monday, May 14. The Judges pronounced their opinions.

Judge TUCKER. The principal question in this cause depends upon the construction of the will of *Robert Johnson*, a most illiterate man, if we may trust the evidence arising out of the will itself, dated *September 4, 1772*, and proved and admitted to record eight days after; whence it may be inferred, that it was made *in extremis*, and when the testator was perfectly *inops consilii*. The testator, having bequeathed his soul to Almighty God, and desired to be buried in a christian-like manner, without further preamble proceeds thus: "It is my desire I GAVE and BECAUSE (give and bequeath) to my son *Robert Johnson* 120 acres of land I bought of *James Kitchen*, and one cow, and one calf, and one heifer, and one feather-bed, and furniture, two ewes and two lambs, and two sows, and one mare, saddle and bridle." He then gives similar legacies of *personals*, to three of his daughters. Then 1*l. 5s.* to his grandson *Kinchen Johnson*, to be paid to him at 20 years old; and then to his grandson *Edmund Johnson* (his heir at law) 5 shillings; then 5 shillings to another daughter; and concludes thus: "I give and because (bequeath) ALL the rest of my worldly estate to my well beloved wife *M. J.* to be at her disposal (*disposn*) *ingurin* (during) her life, or widowhood, and afterwards to my son *Britain Johnson* to him for ever." The question is, what estate did *Robert Johnson* take in the 120 acres above first devised?

I had occasion to remark the other day, that the late President PENDLETON had, in the case of *Kennon v. M<sup>r</sup>Robert*, clearly demonstrated (to my satisfaction at least) "that there are no precise words, nor any precise arrangement of them, nor any thing in any degree *technical*, necessary to the discovery of the testator's REAL and LEGAL intention;" and, that "whenever, from the whole face and context of the will, we can collect the testator's real intention, we are bound to give it legal effect." (a) In the case of *Rose v. Hill*, (b) Lord Mansfield, speaking of the testator's meaning, said, "the testator uses the same words in disposing of the real estate, as he does in disposing of the personal; and they EXPLAIN EACH OTHER." Here the testator has done the same thing,

(a) *Ante*, p. 541. *Wyatt v. Sadler*.  
(b) 3 Burr. 1894.

in the *same* sentence. So far, then, we may consider it as explaining his intention to give an *absolute* property in the one as well as in the other.

There are other circumstances, apparent upon the face of the will, to corroborate this construction. He gives to his grandson (his heir at law) *five* shillings. Probably because he had given his father, in his life-time, whatever he had intended to give him. Be this as it may, it creates a very strong presumption he had no intention that he should ever inherit this 120 acres. Ignorant as he was, he seems to have known that one person might enjoy property by a gift for life, and another for ever afterwards. This appears from the gift of *all the rest of his worldly estate* to his wife for *her* life, or during widowhood, and afterwards to his son *Britain Johnson*. Why then did he not express himself in like manner as to this land, if, indeed, he intended only to give a *life-estate* in it? These circumstances are *so many* evidences of intention, that I think we ought not to reject them, although they may come within none of the technical rules heretofore laid down by the courts of *Westminster Hall*.

Objection. The residuary clause to the wife, with remainder to his son *Britain*, will carry the fee, in this case, both from the heir at law and *Robert*. I think not. For the rule that you cannot infer a particular intention from a sweeping residuary clause was recognised in the case of *Kennon v. M<sup>r</sup> Robert*; and, according to my conception of that case, the residuary clause in that was equally as strong as in the present. It cannot be thought that the testator meant to give a life-estate to his wife in this land, or a remainder (after *two* life-estates) to his son *Britain*, by these general words, which may well be satisfied otherwise: for, from the affectionate terms in which he speaks of his wife, there can be no doubt that there was other estate upon which this residuary clause might operate. (a) I am therefore of opinion in favour of affirming the decree, not only of the Chancellor, but of the County Court, so far as it goes to this point.

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(a) 1 Wash.  
111. *Kennon*  
v. *M<sup>r</sup> Robert*.

Judge ROANE. My opinion is, that *Robert Johnson* the younger took an estate for life only, in the premises in question. My reasons for this opinion were stated in the case of *Wyatt v. Sadler*, the other day; and I shall not repeat them. I am free, however, to admit, that, under the opinion of the other Judges



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in that case, a fee passed to *Robert Johnson*. There is no difference between the cases, so far as we are to be guided by *precedents*. My own opinion, therefore, is, that the decree ought to be reversed; but, in deference to the decision of this Court in the case of *Wyatt v. Sadler*, it must be affirmed.

Judge FLEMING. In the construction of this, as of other wills, to discover the intention of the testator, we must take the whole together, and judge accordingly. The writer of this will was very illiterate, and totally unacquainted with the technical terms of the law; and the testator having given the land in the same clause, and in the same words used in disposing of personal property, (the absolute right in which passed to the legatee,) it appears to me that the testator did not intend a remainder, on the death of his son *Robert*, to his heir at law, to whom he gave a *small* pecuniary legacy, and says no more of him. And, in the last clause of the will, he gives all the rest of his *worldly estate* to his well beloved wife *Martha Johnson*, to be at her "*dis-  
poon ingurin*" of her life or widowhood; (meaning, I suppose, at her *disposal during* her life, &c.) If *Robert* took only an estate for life in the land, his widow, by the residuary clause, would have taken a remainder during her life, or widowhood, as such remainder was not otherwise disposed of by the will; and it could never, I conceive, have been in the contemplation of the testator to make such remote provision for his wife, on a supposition that she would survive his son *Robert*. But, on a presumption that *Robert* took an estate in *fee*, the whole of the will (though written in very untechnical language) seems perfectly consistent. I am therefore of opinion, that *Robert* took a fee in the land in controversy; and, if I had doubted on the subject, it having been already so decided by two different Courts, I should not now disturb the decree.

#### Decree AFFIRMED.\*

\* Note. It seems, from this case, that a joint suit in Chancery may be maintained in behalf of a widow and heirs or devisees, to recover land in which the widow has a right to dower, on a bill stating a case in other respects proper for a Court of Law, (or alleging another circumstance, apparently with a view to give the Court of Equity jurisdiction, without proof of such circumstance,) and merely praying a decree for the land, and for general relief, without specially claiming dower, or praying that it may be assigned; that, having jurisdiction as to the right of dower,

Newell against Wood, Governor of the Commonwealth.

Wednesday,  
May 9.

IN an action of debt in the County Court of Wythe, on a Sheriff's bond, in the name of James Wood, (who sued for the benefit of William Ingledove,) the declaration, in the beginning thereof, complained of James Newell, Stephen Saunders and Henry Hamilton, in custody, &c. of a plea that they render unto the plaintiff thirty thousand dollars, which they owe and unjustly detain; for that, whereas the said defendants, and a certain Andrew Thompson, William Drope and John Hay, by their certain writing obligatory, sealed with their seals," &c. "acknowledged themselves to be held and firmly bound, yet the said defendants, or the said William Drope, Andrew Thompson, and John Hay, have not paid," &c. After a common order confirmed against the defendants, leave was given to amend the declaration by making Thompson and Drope and William Hay, administrator of John Hay, defendants. But no amendment appears to have been made. A verdict having been found for the plaintiff, the defendants filed errors in arrest of judgment; alleging that "they, as sureties of Andrew Thompson, were not liable to the plaintiff, until the said plaintiff had established his claim in a suit against Andrew Thompson, their principal." The County Court arrested the judgment. But on an appeal to the Washington District Court, that judgment was reversed, and judgment entered for thirty thousand dollars, (the penalty of the bond,) to be discharged by the payment of 23 dollars and 40 cents, (the damages assessed by the Jury,) and such other damages as may be hereafter

1. A writ of *superadeas*, to a judgment obtained in the name of the governor, for the benefit of a relator, ought to be served on such relator, and not on the governor.

2. The court of appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law.

3. The point decided in *Leitch v. Berkeley*, 1 H. & M. 61. was in like manner decided in this case.

4. If a court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed.

the Court will entertain it for the whole subject in controversy, and, after decreeing the land to the plaintiffs, will go on to decree assignment of dower to the widow, partition among the other plaintiffs, and rents and profits against the defendants.

See 2 Atk. 3. *Cook v. Martyn*, in which it is said that "praying general relief is sufficient, though the plaintiff should not be more explicit in the prayer of his bill;" and *ibid.* 141. *Grimes v. French*; "though you pray general relief by your bill, you may at the bar, pray a particular relief that is agreeable to the case you make by your bill; but you cannot pray a particular relief which is entirely different from the case;" or "inconsistent with it." *Cooper's Eq. Pleading*, 14. and the cases there cited. For example, the plaintiff may have an account for rents and profits under the prayer for general relief, if the case made by the bill entitle him to it; but not otherwise. 3 Atk. 132.

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assessed upon suing out a *scire facias* thereon, and assigning new breaches."\*

A writ of *supersedeas* to this judgment was awarded by a Judge of the Court of Appeals; which writ was executed on *William Ingledove*, the *relator*, and not on *James Wood*, the *nominal plaintiff*. This was afterwards determined by the Court to have been sufficient and proper service of the writ.

*Wickham*, for the plaintiffs in error, assigned the following reasons for reversing the judgment :

1st. Because the suit was not commenced against *all* the obligors *jointly*, nor any *one* of them *severally*; but against *three* out of *six* obligors.(a)

(a) *Lestwich*  
*v. Berkeley*, 1  
*H. & M.* 61.

2d. Because if, in consequence of the order, made in the County Court, authorizing the plaintiff to make *Andrew Thompson*, *William Drope*, and *William Hay*, administrator of *John Hay*, deceased, defendants, these persons should be deemed parties to the suit and judgment, the said judgment is erroneous in this, that *William Hay*, as administrator, is joined in the same suit with others who are sued in *their own right*; which is contrary to law.

He contended, also, that this case was within the jurisdiction of the Court; although the *damages* recovered amounted only to 23 dollars and 40 cents; because the matter in controversy was more than 100 dollars; and because, by the judgment of the District Court the plaintiffs in error were liable for the sum of 30,000 dollars, which might be recovered on the assignment of new breaches.

The COURT (consisting of all the Judges) agreed in opinion, that the first error assigned was fatal, upon the authority of *Lestwich v. Berkeley*, and that this Court has jurisdiction in all cases where the *penalty* of the bond is sufficient; the *judgment* being always for the *penalty*, to be discharged by *the damages*, &c.†

\* Note. See 1 Wash. 91, 92. *Bibb v. Caythorne*.

† No appeal now lies to the Court of Appeals from any judgment on a *forthcoming bond*; but only a writ of error or *supersedeas*. 2 Rev. Code, p. 123. s. 3.

Judge ROANE observed, that the County Court had rendered a right judgment, though for a wrong reason.

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Judgment of the District Court reversed, and that of the County Court affirmed.

Whitehorn and Wife and others, Heirs and Executors of John Clanton, against Hines and others, Administrators and Heirs of William Howell.

Wednesday,  
May 16.

*WILLIAM HINES* and *John Millison*, administrators of *William Howell*, deceased, and the said *John Millison*, and *Mary* his wife, (which *Mary* is heir at law of the said *William Howell*,) brought a suit in Chancery, in the County Court of *Sussex*, for the purpose of setting aside a deed which the said decedent in his life-time had executed to his cousin *John Clanton*.

1. Under what circumstances, a deed obtained from a man of weak understanding (though not an idiot or lunatic) may be set aside in equity.

The bill (which was filed in *July*, 1800) set forth "that, from the time of his birth to the day of his death, the said *William Howell* laboured under a lamentable and invincible weakness of understanding and intellect, which rendered himself absolutely incompetent to regulate his own affairs, and CLASSED him with propriety among those who are called IDIOTS; that this was universally known and assented to by all who knew him;" that he inherited from his father a tract of land, containing 264 acres, and ten slaves, whose names are mentioned; that, soon after he arrived at the age of twenty-one years, his cousin *John Clanton*, to whom his situation had been long and perfectly known, induced him (although the plaintiff *Mary*, his sister, was then living) to execute a deed to the said *John* for the land and slaves aforesaid, as his absolute property and estate, for the incompetent consideration of the said *John's* finding and providing for the said *William*

2. FRAUD, it seems, may be presumed in equity from strong circumstances; such as gross inadequacy of consideration, breach of trust and confidence, undue influence exerted (especially over a young and weak person by a near relation,) over diligence and assiduity in guarding against objections, and the like.

3. Interest on the hire of slaves disallowed as in *Dilliard v. Tomlinson*, &c. ante, p. 183.

4. It seems, that a bona fide purchaser, without notice of fraud, having received a deed from two persons, (one of whom fraudulently induced the other to join therein,) is not responsible in equity; but the loss ought to fall on the fraudulent vendor. (1)

But quere, if the estate of the fraudulent vendor be not sufficient to make good the loss?

5. In such case, the circumstance that the person defrauded was of weak understanding, but not an idiot or lunatic, is not sufficient to affect the right of the bona fide purchaser.

(1) Note. In this case the measure of relief was the money for which the land was sold, with interest; no other evidence of its value appearing.

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sufficient and plentiful meat, drink, washing, lodging and clothing, in a comfortable and plentiful manner *during his the said William Howell's life, or his remaining a bachelor*; that, after this deed had been thus *fraudulently* obtained, from an unfortunate and wretched being who was ignorant of its operation, the said *John Clanton*, having had the same (after several ineffectual attempts) proved and recorded, *treated the said William Howell, during the remainder of his life*, not like a kinsman, and a man from whom he had obtained a handsome estate, but *as a vagabond, an outcast, and a slave*; his food was of the coarsest kind; his garments were mean, tattered, and filthy; his person was miserably neglected; and himself consigned to the society and conversation of the negroes on the land. In order to manifest more plainly the PALPABLE AND INFAMOUS FRAUD practised on this occasion by the said *John Clanton*, the plaintiffs aver that the deed above-mentioned, when offered, at first, and several times afterwards, to the Court for *probate*, was rejected by the said Court, and not permitted to be recorded, *from their individual knowledge* of the facts above stated, although no person whatsoever appeared to oppose it."

The bill farther stated, "that *John Clanton*, in his life-time, sold the tract of land above mentioned to *Isaac Sever* and *Micajah Hines*, and their heirs, whose title to the same cannot be good or effectual, because the title of him under whom they claim is *founded on a fraud*, and the derivative cannot be superior to the original title; that *Clanton* departed this life, (*after the death of Howell*), to wit, in the month of *August*, 1790, after having made his last will and testament, in which he bequeaths all his negroes (and those above mentioned of course) to his wife *Sally Clanton*, during her life, *or widowhood*, and at her death, *or marriage*, to be equally divided among his children; that the plaintiff *Mary*, "*who is also a person of weak mind*, (and on whom, on that account, divers tampering experiments were made by the said *John Clanton* with a hope to perfect and establish his said *iniquitous* title,) has for many years past resided in the state of *North Carolina*; and that no administration has been taken on the said *William Howell's* estate until very lately; which is the reason why this odious transaction has not been sooner exposed to the view and indignation of the world."

The prayer of the bill was, that *Edward Whitehorn* and *Sally*

his wife, (late the widow of the said John Clanton,) Drury Clanton and others, his infant children, James C. Bailey and Benjamin Wyche, executors of Michael Bailey, who had been his surviving executor, (after the death of Burwell Loftin, who had also qualified,) and the said Isaac Sever and Micajah Hines, purchasers of the land as aforesaid, should be held, as defendants, to answer the same; that the aforesaid "fraudulent" deed should be declared and rendered null to all intents and purposes; that the slaves, and their increase, should be restored, and their reasonable hire, from the date of the said deed, paid to the plaintiffs, administrators of William Howell; that the land should be delivered up to the plaintiffs, Millison and wife, as her absolute estate in fee-simple; that Clanton's representatives should account for and pay to them the reasonable rents and profits of the said land, from the date of the said deed, until the same was conveyed to the said Sever and Hines respectively; and that Sever and Hines should account and pay, in like manner, from the dates of their respective conveyances until the decision of this suit; concluding with a prayer for general relief.

The DEED (exhibited with the bill) is dated the 9th of October, 1783, and recorded the 18th of March, 1784; being for, and in consideration of the love and affection which he (the said William Howell) hath and doth bear unto his cousin John Clanton, and for his said John Clanton's finding and providing for him, from time to time, and at all times hereafter, sufficient and plentiful meat, drink, washing, lodging and clothing, in a comfortable and plentiful manner, during his the said William Howell's life, or his the said William Howell's remaining a batchelor; as well as for the farther consideration of the sum of five pounds current money." The land and slaves were conveyed to the only proper use and behoof of him the said John Clanton, his heirs and assigns for ever: *provided nevertheless*, that, in case the said William Howell shall hereafter intermarry, that the said estate, as well land as slaves, with the increase of the said slaves, (if any,) shall revert unto the said William Howell and his wife during their joint or several lives; and that, in case the said William Howell shall have lawful issue, that the said estate above mentioned, and every part thereof, shall be subject to the disposal of the said William Howell, by deed or will, to and amongst his child or children as aforesaid, or, in case of his failing to make

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such distribution, shall pass, go, and descend agreeable to the act of Assembly in case of his dying intestate; but, in case of said marriage, and the said *William Howell* and wife dying and leaving no lawful issue of their body, then the property of the said estate, both land and slaves, with the increase of the said slaves, to revert to the said *John Clanton*, his heirs and assigns for ever."

The joint and several ANSWERS of *Benjamin Wyche* and *James C. Bailey* stated, that *Michael Bailey*, their testator, "had, previous to his death, fully closed and returned to the Court his executorial accounts; and that they were entirely ignorant of any fraud or iniquity."

The separate answer of *Micajah Hines* alleged, "that he was personally acquainted with the said *William Howell*, deceased, and, from his own knowledge, conceived him to be a man of WEAK MIND AND INTELLECT, but not in so much as to render him incapable of conducting his own affairs, OR to class him with propriety and LAWFULLY amongst those called IDIOTS: that the said *William Howell*, (jointly and first named in the conveyance made to this defendant,) with *John Clanton*, appeared in Court, and acknowledged the deed, with the said *Clanton*, on the 19th of October, 1786: that as to ANY FRAUD OR INJUSTICE committed by the said *Clanton* on the said *Howell*, in obtaining the deed of conveyance for the said *Howell's* land and negroes to the said *Clanton*, this defendant cannot conceive that there was any:" that he never heard of the deed's being offered for probate and rejected by the Court, until very lately: that the deed appears to have been written by Col. *David Mason*, now deceased, and attested and proved as a witness, by him, "who, at that time, was supposed to be a very good judge of law: this defendant cannot therefore suppose that the said *Mason* conceived the said *Howell* to come within the description of an IDIOT, or he would not have proven a deed, whereby himself and his heirs were divested of a handsome estate."

*Isaac Sever*, in his separate answer, says, "that he was not acquainted with *William Howell*, deceased; but, from what he has understood by others, he does not conceive that the said *Howell* could with propriety be classed amongst those whom the LAW deems IDIOTS: that the said *William Howell* and *John Clanton*, jointly, sold the tract of land which this defendant at present holds to a certain *William Milner*, by deed recorded the 19th October, 1786; and from said *Milner* it was sold to a certain *Henry Caion*, and

by said *Caton's* administrator, at public sale, to this defendant, by deed recorded *February 3, 1791*: that, as to any *fraud or iniquity* practised by the said *Clanton* towards the said *Howell* in obtaining the deed or conveyance aforesaid, the same to this defendant is *entirely unknown*; but the said deed appears to be *very artfully and subtilly drawn, on the part of the said Howell*, in reserving to himself and heirs the right and title to the said estate on his marriage and having lawful issue."

The children of *John Clanton*, by their guardians respectively, say, in a joint answer, that they are not acquainted with the transactions mentioned in the bill, but call upon the plaintiffs for proof thereof. *Edward Whitehorn* also answered to the same effect; but farther relied, for his protection, on a bond bearing date the 20th of *February, 1783*, executed by *Mary Howell*, the feme complainant, to *William Howell*, the decedent, who went himself to *North Carolina*, for the express purpose of making a settlement with her, according to his mother's will."

The defendant *Sarah Whitehorn* saith, that the complainants are very much mistaken in the representation which they have made. The said *William Howell* was about 19 or 20 years of age at the time of his mother's death; and this defendant avers, that, for several years before his mother's death, the said *William* had been afflicted with sores and ulcers which some time covered a great part of his body: that he continued in this situation, or worse, until he died, which was about the year 1789; that, when the ulcers dried, as they occasionally did, the bodily pains and afflictions of the said *William* seemed to increase. The defendant believes that the ulcers rose inwardly, because there were frequent discharges of matter from his mouth and nose. These circumstances will account, at once, for the unsightly appearance of the said *William*, and the society in which he might sometimes be seen. The defendant farther saith, that the said *William* was afflicted in this way at the time when he came to live with her deceased husband *John Clanton*; that, when at home, he always dined with the family when he pleased, and was lodged as comfortably as his diseased condition would admit; that he was not an idiot as the complainants suppose: it is true that, from continued and excessive affliction, his mind was impaired; but he generally had understanding enough, not only to preserve his person from mis-

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chief, but to converse rationally and sociably, and to guard against any deception or advantage which others might be disposed to take of him. She farther saith, that the said *William* proposed to the said *John* to make such a conveyance as is contained in the deed hereto annexed, several times before it was actually executed; and this deed, as well as that which the complainants allude to as having been rejected when offered for record, are attested by Mr. *David Mason*. That which is dated on the 1st day of *October*, 1783, was not recorded; because, as she has been told, it was thought to be informal; and not because there was any suspicion of advantage. This defendant farther saith, that the bargain made by the said *William* was, in her estimation, a proper one; because the confinement to which his disease often condemned him would have made it inconvenient, if not impracticable, for him to manage his estate."

The bond of *Mary Howell* (now *Mary Milison*) to her brother *William Howell*, (exhibited with these answers,) was dated the 20th of *February*, 1783, in the penalty of two thousand pounds specie dollars at six shillings each; conditioned, that "whereas the above-named *William Howell* having, at the date of these presents, made unto the above bound *Mary Howell*, her heirs and assigns, a good and lawful right unto three negroes, to wit, a wench named *Annekey*, and her two children *Liddy* and *Tabby*, and their increase; now if the said *Mary Howell*, her heirs, executors, or administrators shall ever claim, demand, sue for and recover, any part of the aforesaid *William Howell's* estate, should he die without issue lawfully begotten, then the above obligation shall be in force, otherwise void and of no effect."

(Signed)

her  
" *Mary* ✕ *Howell*,"  
mark;

and attested by three witnesses, namely,

" *James Nicholson*,  
her  
" *Winne* ✕ *Woodroof*,  
mark,  
" and *Urbane Nicholson*."

The will of *Hannah Howell* (also exhibited) bequeathed to her son *William* five shillings; and, after payment of her just debts, gave the remaining part of her estate, of every kind and

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quality, unto her daughter *Mary*, to her and her heirs for ever ;  
“ but it was her will and desire that if her son *William*, when he  
should arrive to lawful age, should give and convey unto his said  
sister *Mary* two negroes, to her and her heirs for ever, then the  
estate devised to the said *Mary* be equally divided between the  
said *William* and *Mary Howell*.”

By articles of agreement dated the 1st of October, 1783, be-  
tween *William Howell* and *John Clanton*, the said *Howell* “ agreed  
to let the said *Clanton* have the use of ten slaves (the same men-  
tioned in the subsequent deed aforesaid, dated the 9th of the  
same month) during the said *Howell*’s life, as also all his lands,  
stocks of all kinds, household and kitchen furniture, upon the  
said *Clanton*’s finding the said *William Howell* a sufficient quantity  
of decent clothing, meat, drink, mending and board, with every  
other necessary for his subsistence, or till the said *William How-  
ell* lawfully marries, or has issue lawfully begotten of his body ;  
and when the said *Howell* shall lawfully marry, or have issue,  
then the said *Howell* and *Clanton* shall both be released from this  
their agreement : and should the said *Howell* die without lawfully  
marrying, and having lawful issue of his body, then the said *Wil-  
liam Howell* doth give and bequeath, of his own free will and ac-  
cord, all his estate, both personal and real, to the said *John Clan-  
ton*, to him, his heirs or assigns for ever : and should the said *Wil-  
liam Howell* marry and have lawful issue, then the said *William  
Howell* doth bind himself, his heirs or assigns, to make the said  
*Clanton* sufficient satisfaction for all his trouble and expense that  
he the said *Clanton* has been, or may be at, in finding both himself  
and negroes a good sufficient maintenance, as also for raising  
and taking good care of his young negroes ; and should the said  
*Howell*’s lawful issue die before\* he marries, then the said *Wil-  
liam Howell* devises and agrees that the whole of his estate should  
return unto the said *John Clanton*, to him, his heirs or assigns  
for ever.” This instrument of writing (which it seems the Court  
refused to admit to record) was “ signed, sealed and delivered”  
before three witnesses, namely, *Gray Judkins*, *Robert Jones*, and  
*Nathaniel Parham*, and afterwards, on the same day, “ acknow-  
ledged” before “ *Mary Mason*, *John Mason*, and *David Muson*.”

\* So in the record ; but the Reporter presumes there must be some mistake.

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The subsequent deed (of the 9th of the same month) was attested by

" John Hawthorn,  
his

" Richard ~~x~~ Bailey,  
mark,

his

" Thomas ~~x~~ Bailey,  
mark,

" and David Mason."

The *depositions* (amounting in number to thirty-three) generally proved, that, in the opinion of the witnesses, (many of whom were intimately acquainted with him, and knew him from his childhood,) *William Howell*, though not an *idiot*, was a person of uncommonly weak understanding, and totally incapable of conducting his own affairs with propriety. This opinion was declared by *John Massenburg* and *Cyril Avery*, (members of the Court, who rejected the deed, on that ground, when offered to be recorded,) *John Chappell*, sen. *John Chappell*, jun. *Levi Rochelt*, *Joseph Rosser*, *Drury Cooper*, *Marcus Pennington*, *Thomas James*, *Burwell Gilliam*, *John Key*, *Frederick Pennington*, *William Massenburg* and *Hinchia Rochell*. *Drury Cooper* gave, as an instance of his insanity, that he once saw him endeavour to swallow money, though he did not accomplish it. Other evidence, as to particular facts, tending to shew infirmity of intellect, consisted of hearsay only; but the opinions of most of the witnesses above mentioned were expressed as founded on their own knowledge of *Howell*, and all in a very positive manner: some also mentioned the general opinion as agreeing with their own.

*Robert Jones*, sen. (one of the witnesses to the articles of agreement) deposed, that (after reflection) he refused to prove that instrument, and asked *Clanton* what was its intention? "*Clanton* answered, it was well known that *Howell* was not capable of taking care of his estate: this deponent replied the same reason held good, with him, that he was not capable of conveying it; after which this deponent heard the said *Clanton* had got another deed from the said *Howell*, (something different from the former,) and had got it recorded."

*Barham Moore* was well acquainted with *Howell*, who lived with *John Clanton*, at the time he executed a deed to the said *Clanton* for his estate, and had lived there for some considerable

time before. The deponent "believes the said *Clanton* had great influence over the said *Howell*, in his personal conduct, so as to have done almost any thing that the said *Clanton* requested him to do; and he further says, that he never thought the said *Howell* to have common sense so as to be allowed to transact his own affairs."

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*Hinchia Rochell's* deposition was nearly to the same effect with this.

*Mary Mason* swore that, "on the day the deed of conveyance from *Howell* to *Clanton* was written, she asked said *Howell* if he had neither brother or sister that he had rather give his estate to than a more distant relation; who told her he had a sister who had had her part of the estate, and that he had rather his cousin *John Clanton* should have his estate than any other person in the world; that said *Clanton* was to maintain him for it. The deponent then asked said *Howell* what would be his situation if he was to marry and have children; who told her, in that case, the estate was to be returned to him." On being asked whether she believed him to be a man of sound understanding, she said she was not sufficiently acquainted with him to form an opinion.

*Person Williamson* deposed, that he thought *Howell* was a man of sound understanding, though not as capable of conducting a family as some men, and did not know whether he was as capable as common men. He farther stated that, at the Court when the deed was recorded, three persons who were acting magistrates of the County of *Sussex*, viz. *David Mason*, (who wrote it,) *George Rives*, and *George Booth*, or *Nathaniel Dunn*, were called on, at the instance of *Howell* and *Clanton*, (but, as the witness was inclined to think, not by order of the Court,) to inquire into the state of the said *Howell's* mind; that those persons met at the house of *David Mason* to make the inquiry, and "were of opinion that the said *Howell* was capable of conveying his estate."

*Holt Clanton* swore, "that he lived in the family of *John Clanton*, where the said *Howell* lived, for a considerable time, and that the said *William Howell* said it was his wish and desire that, if he died without lawful heir, his cousin *John Clanton* should have his estate, and, for the time he the said *Holt Clanton* lived in the family, he thinks there was no reason for any complaint from the said *Howell*, against said *Clanton*, for bad treatment; that the said *Howell* lived as one of the family, and, as to

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the cheating him out of his land or slaves, it is not his opinion it could be *fairly* done from any trial that ever *he* made, or was acquainted with. He farther saith, that he believes that there *was* few persons that would have taken the trouble of *Howell* for the expectations of the profit that was specified in the articles of the deed of gift."

*Nathaniel Clanton's* deposition was (so far) the same, word for word, with that of *Holt Clanton*. They both, however, expressed a belief that *Howell's* understanding was inferior to that of common men. *Holt Clanton* also said that he was subject to bodily infirmities which rendered him troublesome. *William Clanton* deposed that he had sore legs, or a sore mouth; that, when his legs got well, his mouth would break out; and that this indisposition did not confine, but rendered him disagreeable. As to this point, the deposition of *Hetty Northcross* stated, "that he had very sore legs, hands and mouth, which rendered him disagreeable and indecent;" and that of *Betty Bailey*, "that he was much afflicted with sore legs, ulcers, and the like, which rendered him incapable of seeing to his business, or appearing in a decent manner."

On the subject of *Howell's* treatment by *Clanton*, the general result of the testimony seems to be that, before the deed was recorded, and while he stayed at *Clanton's* house, he was treated well, but was afterwards removed or compelled to reside at the plantation originally his own, where he was allowanced in food, and that very scantily, badly clothed, and greatly neglected, as was fully proved by the depositions of *Barham Moore*, *Patsy Hutchins*, *Drury Cooper*, *Burwell Gilliam*, *John Key*, and *Robert Jones, sen.* The last-mentioned witness said, that *Howell* came to him and complained that *Clanton* did not use him well, and "made the deponent large offers if he would get his estate from the said *Clanton* for him."

As to the bond from *Mary Howell* to *William*; the deposition of *John Faulcon*, of *Warren County, North Carolina*, proved that that bond was written by him, at the request of *William Howell* and *James Nicholson*; but he was not present when it was executed. *Urbane Nicholson* was one of the subscribing witnesses; but does not recollect any of the circumstances. *Mary Nicholson*, his wife, was present when it was executed, at *James Nicholson's*, in *Warren County*. Being asked by the

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complainant *William Hines*, whether she thought *William Howell* to be a man of such sound mind and memory as to be capable of transacting his own business, or conveying his estate in any legal manner, or knowing the value of it, she answered, "from the acquaintance I had with him I do not think he was." *James Nicholson* swore, "that *Mary Howell* lived with him at the time he gave her bond to her brother *William*; that it was executed in his presence, at the solicitation of *William Howell*, as an indemnification to the said *William Howell*, for the delivery of three negroes mentioned therein, in lieu of her proportion of her father's and mother's estate, and his own estate; that the said *William Howell* refused to make a deed to the said *Mary* for the said negroes, unless she would give him the said bond; that *William Howell* went to *North Carolina* to have the said bond executed; and the deponent had no doubt but what he was capable of conveying his estate." *Levi Rochell* deposed, "that he was well acquainted with *Mary Howell*; that she was a very weak woman, and might easily be imposed on."

The cause came on to be heard the 4th of February, 1803; when the County Court "being of opinion that *William Howell*, deceased, the brother of the complainant *Mary*, was, throughout his life, a person of weak mind, unable to manage his own estate, and easily to be imposed upon, and that the indenture executed by him to *John Clanton*, now deceased, was executed for an inadequate consideration, in consequence of the undue influence which the said *John Clanton* had over the said *William Howell*, and of fraud and imposition practised by the former on the latter; being of opinion also, that the bond of release obtained from the complainant *Mary Howell*, an illiterate person, ignorant of its full import, by the over diligence and assiduity which it manifested is an additional badge of fraud;" therefore decreed, "that the negroes mentioned in the said deed, with the increase of the femes to the present day, be delivered to the complainants, and that the defendants deliver to them the original deed from the said *William Howell* to the said *John Clanton* to be cancelled;" that certain "Commissioners do make up and state an account to the court of the reasonable hire of the slaves mentioned in the said deed, from the death of the said *William Howell* to the time of their report; deducting therefrom such sum as to them may seem reasonable for raising and supporting

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the young and chargeable negroes; and also do report the sum for which the lands in the said deed mentioned were sold by the said *John Clanton* to *Micajah Hines* and *Isaac Sever*, together with the interest thereon from the death of the said *William Howell* until the time of such their report; and the Court dismissed the bill as to the defendants *Micajah Hines*, and *Isaac Sever*; they appearing to be fair purchasers without notice of the fraud above stated."

The Commissioners reported the sales of the two tracts of land, with the interest thereupon, and the hire of the slaves, with interest on that hire; amounting in all to 772*l.* 17*s.* 11*d.* 1-2 after making a reasonable deduction for the support of the young and chargeable negroes; and, in their report, stated that, by the approbation of *William Hines*, one of the complainants, and *Sally Whitehorn*, and *Nathaniel Chambliss*, who acted as special guardian to the infant defendants, the said sum of 772*l.* 17*s.* 11*d.* 1-2. was reported as the balance in favour of the complainant. "The defendants having made no exception to this report, by approving the same, the same was therefore confirmed and ratified;" and the final decree was, for the slaves, against the defendants in whose possession they were, and for the above balance of 772*l.* 17*s.* 11*d.* 1-2. against the defendants, executors of *John Clanton*, deceased, to be paid out of his assets in their hands to be administered.

Upon an appeal to the Superior Court of Chancery for the *Williamsburg* District, that Court, on the 26th day of *July*, 1805, was of "opinion, that the weakness of intellect in the said *William Howell*; the inadequate consideration in the deed from him to the said *John Clanton*; the kind of provision, or revocation (if it can be so called,) contained in that deed; the undue influence the said *John Clanton* obtained over the said *William Howell*, his young and weak relation; the violation of trust and confidence in the said *John Clanton*, and the strong presumption of fraud and imposition arising out of the examination of witnesses, together with those presumptions, still stronger, incorporated in the transaction itself, furnish abundant reason for the decree of the County Court; and, therefore, there is no error in the said decree. This Court would have directed an adequate allowance to have been made for the clothing and maintenance of the said *William Howell*, but that the Court discerneth, by the report of

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the Commissioners, that no charge for the hire of slaves, or interest of the money arising from the sale of the land in the proceedings mentioned is made, until after the death of the said *William Howell*, which hires and interest must have been intended for that allowance, and which this Court considers as a very ample allowance. And, with which report the appellees appearing to be satisfied, this Court is content to approve. Therefore, it was decreed and ordered, that the decree aforesaid be affirmed; and that the appellants, executors of the said *John Clanton*, out of his estate in their hands to be administered, pay, unto the appellees, damages according to law for retarding the execution thereof, and their costs by them about their defence in this behalf expended."

From this decree an appeal was taken to this Court.

*Hay*, for the appellants, observed, that the testimony as to the treatment of *Howell* by *Clanton* (relating to circumstances subsequent to the contract) was foreign to the cause, and introduced merely to excite prejudice. The influence said to have been exerted by *Clanton* over *Howell* is not charged in the bill; neither is any fraud alleged, except that of obtaining the deed from an idiot. The plaintiff therefore is precluded from introducing evidence as to fraud or influence; for, both in law and equity, the *allegata* and *probata* ought to agree.(a) The question then is, whether *Howell* was an idiot? And I contend that, according to the legal definition, he was not.(b) Following facts, and not opinions, (for opinions of witnesses, I contend, are no evidence,) there is not a tittle of proof of idiocy. And, even as to opinions, not a single witness says that he thinks him an idiot. The testimony, such as it is, only goes to weakness of understanding.

2. But if proof of weakness of understanding (falling short of idiocy) could be received in support of this bill, there is no legal evidence even of this; the whole consisting of opinions only, except in one solitary instance. The single fact of *Howell's* attempting to swallow money is not conclusive; and, indeed, is entitled to no weight, unless all the circumstances were stated, to shew how much was serious, and how much frolic. Opinions are not evidence where facts can be obtained; according to the maxim, that the best evidence the nature of each case admits shall always be required; for facts are better evidence than opinions. This Court ought to exert its own opinions; not depend on the

(a) *Coop. Eq.*  
pl. 7. 11 *Ves.*  
Jun. 24th.  
*Clarke v. Trafton.*  
3 *Atk.*  
110. *Jones v. Jones.*  
(b) 1 *Tuck.*  
Bl. 2d part,  
p. 303. 1  
*Fonb.* 56. 4  
*Com. Dig.* 361.



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Syers v.  
Bridge, 19  
Vin. 86. 3  
Vin. 8. 1  
M'Nulty, 362.

opinions of others. Besides, here are conflicting opinions, and how can the Court decide, without the facts on which the opinions on both sides were formed?(a)

In an action of *assumpsit* on an account, would an *opinion* that the money was due, be admissible? Certainly not. Even in the case of proving hand-writing, mere opinion is not evidence; but a witness who has seen the person write must be produced. Opinion is admissible only where matters of fact are not within our reach; as, in the case of a man's being wounded and dying, the opinion of physicians may be taken as to the question whether his death was occasioned by the wound: but if they differ in opinion, their evidence has no weight.\* I admit it to be extremely difficult to tell exactly, in all cases, where *fact* ends and *opinion* begins; but the present case is very plainly one of opinion only: the total omission of facts shews that facts did not exist. Indeed, in the case of attacking the character of a witness, opinion only (as to his general reputation) is admissible, and not facts; and this for very good reasons; because the person whose character is attacked, is not prepared to rebut such facts. But in all other cases the rule is inflexible that facts are to be preferred to opinions.

(b) 1 Fomb.  
65. 66. 3 P.  
Wins. 130.

3. Weakness of intellect, even if fully proved, is not sufficient to vitiate the contract. The witnesses say that *Howell* was incapable of managing his estate: but many men are subject to this incapacity; and yet the validity of their contracts is never questioned.(b)

4. But *Howell's* competency to contract is admitted by the plaintiffs in the cause. *Mary Howell*, the plaintiff beneficially entitled, executed a bond to him as a person competent; and that bond is a bar to her maintaining this suit.

5. The contract is said to be unequal. But inadequacy of price is not charged in the bill as a ground of relief. Neither will the Court set aside a contract on the ground of inadequacy only.(c) This contract might have been a good, or a bad one, on the part of *Clanton*. The value of the consideration must depend upon

(c) Sug. Law  
of Vend. 169,  
170. 2 Powell  
on Contracts,  
152. 1 Fomb.  
116 n. (v).  
9 Ves. jun.  
246. Coles v.  
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\* Note. See also *Peake's N. P. Cas.* p. 25. *Thornton v. The Royal Exchange Assurance Company*; and *ibid.* 41. *Chaurand v. Angerstein*, also cited by Mr. Hay, as examples of cases where opinions of persons skilled in particular trades or businesses are admissible evidence.

the feelings of the parties. Few would have had such a member in their family for the whole County of *Sussex*. The land was not only poor, having been sold for 140*l*. though the quantity was 264 acres, but the negroes were young, and an expense. A contract, too, is never set aside for inadequacy, where, by its terms, the property might be regained by the vendor. Besides, inadequacy of price is only regarded in contracts; and this deed is partly a gift in consideration of affection, and partly a contract. 2 *Bl. Com.* 297.

6. The decree was erroneous in allowing interest on the hire of slaves. (a)

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(a) *Ante*, p. 188. *Dilliard v. Tomlinson*, &c.

*George K. Taylor*, for the appellees. Mr. *Hay*'s first point, that the bill charges idiocy only, and that therefore nothing else must be proved, is not correct in point of fact. The bill charges "a weakness of understanding which rendered *Howell* incompetent to regulate his own affairs, and classed him among those who are called idiots." The latter part of this clause is only the amplification and deduction of counsel. But if this were a direct charge of idiocy, is it not competent for a party to prove his allegation as far as he can? Even in criminal cases, the prisoner may be charged expressly with *murder*, and, yet, circumstances may be proved which subject him to punishment for manslaughter. In *Bennett v. Vade*, 2 *Atk.* 325. it was decided, that a bill may be framed with two different aspects, that, if one fails, the other may as effectually answer the purpose. In that case, indeed, the bill was amended, in order to insert the charge of fraud; but, here, fraud is originally charged, without the necessity of any amendment.

2. It is said there is no legal evidence of *Howell*'s weakness of understanding. But, surely, *opinion* is the best evidence of a man's state of mind. No other, indeed, can be given. To state instances in which weakness of intellect was discovered, is often difficult and impossible. Opinion must be formed from general observations on the conduct of the party. To what would the doctrine lead, that instances must be specified? A witness may have seen him engaged in an equivocal act which might have been the effect of weakness, or of levity. Would this evidence be as strong as that of a person who had known him from his infancy, and declares an opinion that he was uncommonly weak, and inca-

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pable of managing his own affairs? The testimony of *Robert Jones*, sen. proves clearly that *Clanton* himself was sensible of *Howell's* want of capacity. This is a very important fact; and *Jones's* refusing to prove the deed, for that reason, together with the Court's refusing to admit it to record, from their own knowledge of the weakness of *Howell*, are also important facts.

It is objected that *inadequacy* of consideration is not charged in the bill; but if the word "*inadequacy*" be not used, "*incompetency*" is; which is the same thing. The case then amounts to this; that *Howell* was and is proved to be a man of extremely weak understanding; that *Clanton* took him to his house, affecting to be his protector; acquired considerable influence over him, and became, in equity, a trustee; and, instead of protecting, induced him to sign a deed conveying to himself all his estate for a very inadequate consideration: a combination of circumstances fully sufficient to set aside the deed. (a) In *Clarkson v. Hamway*, it was considered a badge of fraud that *Hamway* only took a bond to secure the annuity, and not a mortgage. In our case no security at all was taken; but a tract of land and ten negroes were given for the privilege of breathing in this world. Mr. *Hay* contends that the land was worth only ten shillings per acre, and the negroes were all young and expensive. But, as to the negroes, this is not probable; and, in fact, the report of the Commissioners proves they were profitable; for it shews they were equal to the support of *Howell*.

Again, it is said that *Howell's* competency of understanding is proved by his obtaining the bond from his sister! If that act proceeded from *Howell* it was wonderful indeed! From a man who never before had been out of the County of *Sussex*! But it was, evidently, a mere artifice of *Clanton*; and *Howell* was only his instrument; through abundant caution; for, if he had gone out himself he might have been suspected. This bond is relied on as a bar! But if the transaction was fraudulent, shall the person who was guilty of the fraud shelter himself under it?

But there is one damning fact which makes this a stronger case than any in the books. The power of revocation inserted in the deed is relied on shewing that no fraud existed in the transaction. Yet in *Bennett v. Wade*, (b) a similar power in the deed from Sir *John Lee* is relied on as evidence of fraud. But what was the power of revocation in *Howell's* deed? In

(a) 2 P. Wms.  
203. *Clarkson*  
v. *Hamway*.

(b) 2 Atk.  
326.

case of his marriage! A man who was a mere mass of corruption to marry! But, in fact, in less than two years afterwards, *Clanton* sells the land, and induces this poor ignorant boy to join in a deed! Where then was the habitation for his wife?

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In *Filmer v. Gott*,<sup>(a)</sup> the deed was set aside on account of importunity in obtaining it, inadequacy of price, the vendor living alone and having no friend to consult. But whom did *Howell* consult? The man interested to deceive him. From the death of his mother to the date of this deed, he continued an inmate of *Clanton's* house, who abused the confidence reposed in him. All the witnesses prove extreme kindness to *Howell* before the deed, and, afterwards, extreme brutality. Wherever there was a remarkable intimacy, and undue influence, the Court will look with a jealous eye on the transaction, and set aside the deed if there be not perfect reciprocity; as in 1 *Vez.* 400.<sup>(b)</sup> where the case was of a parent and child; 1 *P. Wms.* 118.<sup>(c)</sup> of undue influence in prospect of marriage; 3 *P. Wms.* 129.<sup>(d)</sup> of an heir entrusted to a servant who imposed upon him; (in which case it is said that "a breach of trust is, of itself, evidence of fraud, nay, of the greatest fraud;") 1 *P. Wms.* 310.<sup>(e)</sup> of a young heir induced to sell an expectancy at an under rate.<sup>(f)</sup> So, too, a bond is not obligatory where its effect was not known to the obligor.<sup>(g)</sup>

(a) 7 Bro.  
Parl. Cas. 70.

(b) *Cocking v. Pratt.*

(c) *Duke of Hamilton et Ux. v Lord Mohun.*

(d) *Osmond v. Fitzroy, &c.*

(e) *Tusleton v. Griffith.*

(f) See also *Heathcote v. Paignton*, 2 Bro. Ch. Cas. 167—175.

(g) 2 Pow. on Cont. 203. 2 Bro. Ch. Cas. 150. *Evans v. Llewellyn.*

As to Mr. *Hay's* sixth point that interest ought not to have been allowed on the hire of the slaves; I shall not contend, after the decision of this Court, that interest on conjectural profits is allowable. But there are circumstances in this case which take it out of the general rule. Both sides consented to the report as it stands. Indeed, the Commissioners made no report, but only signed what the parties had agreed too. It is stated on the record (in the final decree) that the defendants not only made no objection, but approved of it.

*Wirt*, on the same side. Admit the fact that *Howell* was not an idiot; yet weakness of understanding, though not amounting to idiocy, is amply sufficient, when connected with any one of the other circumstances of this case, to set aside the contract. Weakness of intellect alone is not sufficient: but coupled with

\* See on this subject a very comprehensive note of the editor. 3 (*Coxe's*) *P. Wms.* (5th edit.) p. 131.; in which the authorities generally are collected.

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(a) *White v. Small, 2 Ch. Cas. 103.*  
*Clarkson v. Harway, 2 P. Wms. 203.*  
(b) *1 Bro. Ch. Cas. 6 8. 9.*  
*Gwynne v. Meuton. 2 Bro. Ch. Cas. 167*  
*—175. note.*  
*Heathcote v. Pagmon. 10 Ves. jun. 209.*  
*Underhill v. Horwood.*  
(c) *Heron v. Heron, 2 Atk. 161.*  
*Young v. Peachy, ibid. 257.*  
*Chesterfield v. Janssen, 1 Atk. 301.*  
*2 Ves. 155.*  
*S. C. Coe v. Gibson, 1 Ves. 503.*  
*Proof v. Hines, Cas. temp. Talb. 111.*  
(d) *2 Ves. 155.*  
*1 Fonb. 124. note (b).*  
(e) *1 Bro. Ch. Cas. 1.*

any thing else, as inadequacy, fraud, &c. it is.(a) So also inadequacy, *per se*, is not enough, in general. Yet gross inadequacy is considered as evidence that the mind was under undue influence.(b) But it is not necessary, in this case, to rely on the principle that gross inadequacy, of itself, vitiates the contract; for it certainly is sufficient to have that effect when combined with *Howell's* weakness of intellect, and bodily distress; with his being just of age at the time; or with *Clanton's* near relationship and great influence over him; all which circumstances are here united.(c) Actual fraud, or imposition, in such a case, is not necessary to be proved, but may be presumed in a Court of Equity.(d)

But it is said there is a farther consideration for this deed besides a support for life; viz. love and affection. In *Gwynne v. Heaton*,(e) very particular care in the wording of a contract is mentioned by Lord *Thurlow*, as a sign of fraud. But the consideration of affection must be for a near relation. 4 *Cruise's Digest*, 25. carries it no further than to brothers, or children of brothers; which does not extend to a first cousin, or father's brother's child. But the consideration of blood is a mere non-entury, where a deed is drawn from a weak man.

As to the objection that the charges in the bill are not sufficient to let in our evidence as to weakness of intellect, inadequacy of consideration, undue influence and fraud; the result of the authorities is, that where there is a single insulated charge, the plaintiffs shall not be permitted to surprise the opposite party, by shifting their ground. But a charge of fraud in general terms is sufficient.(f) In *Jones v. Jones*, 3 *Atk.* 110. forgery was the single charge in the bill. But here the separate badges of fraud are expressly mentioned; and the bill concludes with a prayer that the deed may be set aside for fraud.

Again, it is contended that opinions of witnesses are not admissible evidence to prove weakness of understanding. But as to this point, opinions are the best evidence. Mr. *Hay* admits that opinions may be given by physicians and artists. So also opinions are admissible as to hand-writing; because in such case the witness has had opportunities of forming opinions, which the Court and Jury had not, and which are not susceptible of description. If he should attempt to specify, he would have to state the manner in which the writer cut each particular letter. So, in

cases of weakness, opinions are formed from a variety of circumstances; frequently not so much from active, as passive. If insulated facts were taken as evidence, Sir *Isaac Newton* might have been convicted of lunacy; for he has been seen to go into company with only one stocking on. To oppose this unfavourable circumstance by other facts, a witness must read his *principia*.

In 2 *Atk.* 337.(a) it is even doubted whether particular facts can be given in evidence at all. But at length it is held that you may give evidence, both as to general opinion and particular facts, in an issue on *non compos mentis*. So, witnesses to a will are only called upon to speak of the general state of the testator's mind. The circumstance, that *Howell* told Mrs. *Mason* the object of the deed; is no proof of his having capacity to make such a contract as ought to bind him; and does not make the case stronger than that of *Gartside v. Lsherwood*, 1 *Bro. Ch. Cas.* 560. Great reliance is placed upon his trip to *North Carolina*, and obtaining the bond from *Mary Howell*; but, taking that fact with all its circumstances, it is rather a proof of additional fraud practised by *Clanton*, who must have instigated him to such an uncommon exertion. That *Howell* acted under *Clanton's* influence, and did not understand the nature of the bond, is evident; for a condition was introduced into it which made him an instrument of fraud upon himself.

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(a) *Clarke v. Periam.*

*Hay*, in reply. A cousin is unquestionably within the degrees of consanguinity to raise a use on a covenant to stand seised to uses.(b)

(b) *Saund. on Uses*, 436.

*Fraud* is never to be presumed. If all the Chancellors from the time of *Adam* to this day were to say that it may be presumed, my judgment would still rise in rebellion. 1 *Vesey*, jun. 20.(c) 2 *Com. Dig.* 314. and 1 *Fonb.* 399. shew that fraud is never to be presumed; though, I admit, it may be inferred from circumstances calculated to justify such inference.

(c) *Lewis v. Pead.*

The clause in the bill charging *idiocy*, is improperly subdivided by Mr. *Taylor*. The first part of that clause ought to be taken in connection with the last. *Idiocy* is not the consequence of weakness of understanding; but the converse is true: and saying that a man is "classed with *idiots*" is equivalent to saying that he is an *idiot*.

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Monday, June 4. The Judges pronounced their opinions.

Judge TUCKER. This is a bill to set aside a conveyance of lands and negroes, made the 20th of *February*, 1783, by *William Howell* to his cousin *John Clanton*, both deceased, on the grounds stated in the bill.

The bill states, that "*Howell*, from the time of his birth to the time of his death, laboured under a lamentable and INVINCIBLE weakness of understanding and intellect, which rendered him absolutely incapable of regulating his own affairs, and classed him, with propriety, among those who are called idiots;" that this was universally known, and assented to, by all who knew him; that, soon after he arrived at the age of twenty-one, his cousin *John Clanton*, to whom his situation had been long and perfectly known, induced him, although he had a sister then living, who is one of the complainants, to execute a deed, for all his lands and slaves, as his absolute property and estate, for the INCOMPETENT consideration of finding and providing for him sufficient and plentiful meat, drink, washing, lodging and clothing, in a comfortable and plentiful manner, during the said *Howell's* life, or remaining a batchelor; as will more fully appear by the deed, in which there is the following clause, not mentioned, or in any way noticed in the bill; "Provided nevertheless, and it is hereby agreed on by and between the parties to these presents, to be the true intent and meaning of these presents, that, in case the said *William Howell* shall hereafter intermarry, that the estate above conveyed, as well land as slaves, with the increase of the said slaves, shall revert unto the said *Howell* and his wife, during their joint and several lives; and, in case the said *Howell* shall have lawful issue, that the said estate, and every part thereof, shall be subject to his disposal among them, by deed or will; or, in case of his failing to make such distribution, then it shall pass, and go, and descend agreeably to the act of Assembly, in case of his dying intestate; but if no such issue, the same to revert to *Clanton* and his heirs, after the death of *Howell* and his wife." The bill then proceeds to state that, after this deed had been thus fraudulently obtained from an unfortunate and wretched being, who was ignorant of its operation, the said *Clanton* having had the same, after several ineffectual attempts, proved and recorded, treated *Howell* as a vagabond and outcast, and a SLAVE; and, in

order to manifest, more plainly, the palpable and infamous fraud practised on this occasion by the said *Clanton*, the complainants aver and offer to prove that the deed above mentioned when offered, at first and several times after, to the Court for probate, was rejected by the Court, and not permitted to be recorded, from their individual knowledge of the facts before stated; and after stating some other circumstances not material to be noticed in this part of the cause, they pray that the Court may declare and render null to all intents and purposes the aforesaid fraudulent deed. &c.

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The answer of *Sarah Whitehorn*, who was the wife of *John Clanton*, saith, that the complainants are very much mistaken in the representation which they have made; that *Howell* was about nineteen or twenty when his mother died; and she avers that, for several years before his mother's death, he had been afflicted with sores and ulcers which sometimes covered a great part of his body; that he continued in that situation, or worse, until he died, which was about the year 1789; that, when the ulcers dried, as they occasionally did, his bodily pains and afflictions seemed to increase. She believes that the ulcers rose inwardly, because there were frequent discharges of matter from his mouth and nose; which will account for his unsightly appearance, and the society in which he might sometimes be seen: that he was afflicted in this way when he came to live with her deceased husband *Clanton*; that, when at home, he always dined with the family when he pleased, and was lodged as comfortably as his diseased condition would admit; that he was not an idiot, as the complainants suppose. It is true that, from continued and excessive affliction, his mind was impaired; but he generally had understanding enough, not only to preserve his person from mischief, but to converse rationally and sociably, and to guard against any deception or advantage which others might be disposed to take of him. She further saith, that the said *William* PROPOSED to the said *John* to make such a conveyance as is contained in the deed, several times before it was actually executed; that that deed, as well as the one which the complainants alluded to as having been rejected when offered for record, is attested by *David Mason*; that which is dated the first of *October*, 1783, (which is admitted by consent, and appears at the end of this record,) was not recorded, because, as she has been told, it was thought to be informal,



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and not because there was any suspicion of advantage. She adds, that the bargain was, in her estimation, a proper one, because the confinement, to which his disease often condemned him, would have made it inconvenient, if not impracticable, for him to manage his estate.

About two thirds of the witnesses (of whom there are near thirty) testify either *their own*, or the *general opinion* of the neighbourhood, that *Howell* was a person of extremely *weak* intellect; but it was conceded by the appellees' counsel that there is no proof that he was an *idiot*. The rest of the witnesses corroborate the account given of him in the answer. There is, however, *this* obvious distinction between the answer and the depositions taken in support of the bill. The answer states *facts*; the latter, in general, *OPINIONS* only. If it be objected, that the answer is not entitled to the same credit as the deposition of a witness, who is supposed to be disinterested; there are circumstances apparent upon this record, that, in my opinion, place this answer, in point of credibility, upon very high ground. First, it is perfectly responsive to the bill, and stands uncontradicted even by a shadow of evidence, in a most material point, which I shall hereafter notice. Secondly, it appears from the will of *John Clanton* (among the exhibits) that his widow, upon her marriage with the defendant *Whitehorn*, forfeited every provision made for her in *Clanton's* will. She, therefore, is presumably a defendant without interest in the cause, whose answer, where it is responsive to the bill, is thereby entitled to the *utmost* credit; especially, where it stands uncontradicted as to the fact alleged. It states, then, in my opinion, in a very candid manner, a good and sufficient *inducement* to the contract on the part of *Howell*. Helpless and forlorn, as he appears to have been, from the whole current of the testimony, it was certainly an object with him (if he had any intellect at all) to secure to himself, during his miserable existence, "*sufficient and plentiful meat, drink, washing, lodging, and clothing, in a comfortable and plentiful manner.*" These are the cogent inducements to the bargain, and some of the considerations (and certainly the principal) mentioned in the deed. That he possessed sufficient intellect to know this, appears not only from what passed between himself and Mrs. *Mason*, when he came to her husband to draw the deed; but from his subsequent complaint to *Robert Jones*, one of the complainants' witnesses, "that *Clanton*

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did not use him well; and from the large offers which he made to *Jones*, if he would get his estate from *Clanton* for him." But a farther and more convincing proof that he was not a person of such weak understanding as not to know what he was about, when making a bargain, appears from the singular and uncontradicted fact of his taking a journey by himself, (as far as appears to the contrary,) to the house of *James Nicholson*, in *North Carolina*, where his sister (one of the complainants) lived, for the express purpose of giving her *three* instead of *two* negroes, which his mother, by her will, had required of him to give that sister, before he should be entitled to any part of the mother's estate. The bond of relinquishment which he took from his sister on that occasion, was drawn by *John Faulcon*, of *North Carolina*, and executed at *Nicholson's* house, where she resided, and attested by *Nicholson*, his wife, and a third witness. Not a syllable is heard of *Clanton* on this occasion; and, yet, this very transaction is imputed to HIM as an *evidence of fraud*, although neither charged as such (nor even hinted at) in the bill, nor mentioned by any other of the witnesses. This transaction, therefore, as it appears by this record, is conclusive evidence, that *Howell* was neither an *idiot*, (as the charge in the bill imports,) nor yet a person of such weakness of intellect, as not to be able to understand the nature of his own interest, or of any bargain he might be about to contract.

But it is insisted, that an advantage was taken of him by his relation *Clanton*, immediately, or very soon after he came of age; and, although weakness of understanding alone may not be sufficient to set aside a contract fairly made, and for an adequate consideration, yet, when it is coupled with such a circumstance as that just mentioned, or with previous dependence; (as appears to have been the case, in some degree, at present;) or with trust and confidence; or with unbounded influence; or with *gross* inadequacy of price or consideration; or with extreme distress of situation; or with the *pretermision* of an unoffending sister, who was his nearest relation and heir; that a Court of Equity will rescind the contract.

I shall not enter into a minute discussion of all these several points, all which I conceive to be put completely out of the question, either by the facts apparent in the record in support of the defendants' right, or the *want of such facts* on the part of the complainants; or the *want of charges in the bill* upon some of

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these subjects. The only direct charge in the bill (except that *invincible* weakness of understanding, of which there is no proof) is, that *Clanton induced Howell* to execute the deed for the *incompetent* consideration therein mentioned. Now the answer of *Sarah Whitchorn* (which is expressly responsive to this charge of *Clanton's inducing Howell* to execute the deed) states, "that *Howell* PROPOSED to *Clanton* to make such a conveyance *several times* before it was actually executed." There is not a *scintilla* of evidence to the contrary in the whole record: on the contrary, *Mary Mason's* testimony may well be considered as corroborating this assertion in the answer. Neither *Howell's* supposed youth, nor previous dependence, nor his trust and confidence in *Clanton*, which seem rather to have sprung from his affection and a sense of gratitude, than from any other cause, nor his unbounded influence, (of which there is no sort of proof,) can derive any strength, in opposition to this UNCONTRADICTED testimony, so perfectly responsive to the most material charge (*except idiocy*) in the bill. I shall therefore proceed to the inadequacy of *consideration*, as the next subject of inquiry.

Neither the value of the land, nor that of the negroes, is stated in the bill; nor in either of the answers; nor in any of the depositions, that I can discover. An obvious reason for the omission in the *latter* appears to be, that it was not put in issue by the *former*. The Commissioners appointed by the Court of *Sussex* County to state an account of the *reasonable* hire of the slaves mentioned in the deed, (from the time of the *death of Howell* to the time of their report,) and to report the sum for which the lands were sold, (by *HOWELL* and *CLANTON jointly*, as appears from one of the answers, though neither the consideration money, nor the person *to whom* the same was paid, or, if to *both*, in what proportions such payment was made, anywhere appears,) have furnished some *data* by which a conjectural estimate of the actual fee-simple value of the lands, when sold, and the annual worth, or hire of the slaves, during the whole period that elapsed between the date of the original deed in *October, 1783*, and the date of the Commissioners' report, the 1st of *October, 1804*, a period of one and twenty years, may be guessed at. They state the sales of the two tracts of land, containing, as alleged in the bill, 264 acres, at 145*l.*; which is just eleven shillings an acre. They estimate the negro hire for the year 1789, due *January 1,*

1790, NOTHING. This *might* be because *Howell* died late in 1789; but whether it were so or not does not appear; nor are we informed *when* he died. The next year we find the value of their hire (reasonable deductions for their maintenance and support being first made by the Commissioners) charged at six pounds. The next year 12*l.* 17*s.* 6*d.*, the third year, 19*l.* 9*s.* 1*d.* 3-4.; the *average* value of those three years being 12*l.* 15*s.* 6*d.* 1-2. *per annum*: but, if the year 1789 ought to be taken into the account, (as it would seem, from the Commissioners' thinking it necessary to notice that year,) the average value of the slave hire, after making due deductions for the support and maintenance of such as were young and chargeable, for those four years, was only 9*l.* 11*s.* 7*d.* 3-4. Taking it, however, at the highest *average*, and adding thereto the interest of 145*l.*, for which the lands were sold, amounting to 7*l.* 7*s.* 6*d.* more, the average value of *Howell's* whole annual income for those three years amounts to 20*l.* 3*s.* 0*d.* 1-2. But we have no reason to rate it so high, at any period *during his life*. For the value of the slaves being only 6*l.* the first (or second year) after his death; upwards of 12*l.* the succeeding year; near 20*l.* the next; and, so on, gradually increasing from year to year, till we find it valued to 37*l.* 4*s.* 6*d.* in 1802, which is the highest estimate of the whole; we are well warranted in supposing that the greater part, or the whole of them, consisted of young negroes, who were either chargeable, or, at most, not very profitable. Taking it either way; and, even supposing the annual profits of *Howell's* estate, at that time, to have been equal to 20*l.* 3*s.* the average for those three years, I should not deem that sum, by any means, a *sufficient* consideration, for the comfortable and plentiful accommodation and support of a miserable object, such as *Howell* is described to have been.

Objection. That it was not the *yearly value* of the lands and negroes *only* that *Clanton* was to have by this deed, as a consideration for the maintenance of *Howell*; but the absolute property therein.

Answer. That is not the case. If *Howell* had married, the annual profits were *all* *Clanton* was to have till the death of *Howell* and his wife both; and, if he had lawful issue, the property was gone from him for ever. And, though it may be supposed the chance of *Howell's* marriage was not great, yet he was free to do so, and

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thereby to put an end to the *present*, and, possibly, to the *future* interest and hopes of *Clanton*; who had during the life of *Howell*, no more than an estate upon an express condition in deed, which it was in the power of *Howell* to avail himself of at any moment, and thereby defeat the estate, if he thought proper so to do.

Objection. *Howell* was not supported and maintained in the manner he ought to have been by *Clanton*. This, if true, might have been some ground for an application to a Court of Equity by *Howell*, in his life-time, either to rescind the contract, or to compel *Clanton* to pay him a stated allowance for his support, as, from all the circumstances of the case, might have been most proper: but it furnishes no ground for the representatives of *Howell* to apply, at this time of day, for the rescision of a contract, the beneficial provisions of which terminated, on his part, with his life. If the person to whom he complained that *Clanton* did not use him well, had applied to a Court in his behalf, to permit him to sue in *forma pauperis*, the case might have appeared such as to entitle him to some relief; but, what it ought to have been, this Court cannot, at this time, by any possibility, judge. It appears to me, therefore, that there is neither a gross inadequacy of consideration, nor, under all the circumstances of this case, any inadequacy of consideration at all. Neither is there any evidence in this record, of any advantage being taken, by *Clanton*, of the extreme distress of *Howell*, nor of his exerting, at any time, any improper influence over him; nor is there, that I can perceive, the smallest proof of *fraud*, or any undue practice whatsoever on the part of *Clanton*; unless we are to presume it from the face of the deed itself, which has not even the slightest colour of it, in it; or, unless we infer it from what has been said of *Howell's* complaints of not being well used, which the answer of *Sarah Whitehorn*, and the depositions of several of the witnesses to the same effect, render questionable at least; and certainly, those complaints, if true, fall very far short of establishing a charge of *fraud*, unless we were to denominate every breach of a positive contract, a FRAUD; which no Court of Equity has yet ventured to do, that I know.

I have preferred considering this case upon the *real merits*, as it appears upon the face of the record, to an investigation of the practical points which have been argued at the bar; because I would never wish to reverse a decree of a Court of Chancery, upon

any other ground than the merits of the cause, where they can be fairly got at. In the present instance, my opinion is, that both decrees be reversed, and the complainants' bill dismissed with costs.

But if the complainants were entitled to a decree in their favour, I am still of opinion that the present decree is erroneous.

My first objection to the present decree is, that the Commissioners have allowed *interest* on the hire of the slaves, from year to year, from the period of *Howell's* death, to the day of making their report.

In giving my opinion in the case of *Dilliard v. Tomlinson*, this term, I stated several instances, where I thought an executor or administrator could not be chargeable for interest upon money, *actually received* by him. Much less with interest upon the hire of slaves, which, peradventure, he may *never have received*, or not for several years after it became due. I beg leave to refer to what I then said, as containing my deliberate opinion, and the reasons for it.

Objection. The report states that the same was made in the presence, and with the approbation, of the defendants.

That is not the case. *Sally Whitehorn*, wife of one of the defendants, and *Nathaniel Chambliss*, who acted as special guardian to the *infant* defendants, are stated to have been present. But the *executors* are neither stated as being present, nor even as having notice to attend. The *consent* of the *others*, who were *present*, therefore, cannot possibly affect the *executors*. Neither (I presume) could *Whitehorn* be affected by the consent of his *wife*, unless it were proved she acted as his *attorney*, under a special power and authority from him. Nor will this Court, sitting as a Court of Equity, suffer the interests of *infants* to be committed, by a careless or ignorant guardian *ad litem*. And I must be permitted to doubt whether a Court of Equity ought ever to sanction the report of its Commissioner, when he *mistakes the law*; although the parties may submit to his decision, without filing any exception to his report. For his office is to state *FACTS* for the consideration of the Court; where he undertakes to *do more*, I conceive that his report is no less open to impeachment for *error* than the decree of the Court, proceeding upon a mistake in law, is. For a contrary doctrine would be putting the Commissioner's report, in point of legal obligation, upon higher ground than the decree of the Court itself. Upon these grounds, I think

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the charge of interest on the hire of the negroes is utterly erroneous; for this suit was not brought till near eleven years after *Howell's* death, and, until a very short time before it was brought, there was no administrator to whom any debt due to him from any person whatsoever could be paid or tendered. The legal right in the slaves being in the executors of *Clanton*; had there been an executor of *Howell*, how could *Clanton's* executors have been justified in paying them for the negro hire, until the decree should fix their right to demand it. How then are the executors to be made chargeable for interest upon money which they had no right to pay? The most that equity can do, is to make them accountable for the hire of the slaves, free of interest upon that hire.

But here a question occurs. From what period are the executors to be charged with the hire, if, indeed, in this case, they are chargeable at all?

*John Clanton* died before the second of September, 1790; this suit was not brought until April, 1800. *Burwell Loftin* and *Michael Bailey*, who qualified as his executors, were at that time both dead; *Michael Bailey*, the surviving executor, had, before his death, fully closed and returned to the Court his accounts as executor of *Clanton*, as is positively stated by the defendants, *J. C. Bailey*, and *Benjamin Wyche*, his executors, in their answer; to which there was no replication, that I can discover; nor are there any depositions taken which bear any relation to this fact. So that the answer, if not actually admitted to be true, in all its parts, stands uncontradicted in this particular. If *Michael Bailey*, the surviving executor, had been alive when the suit was brought, and had put in an answer to the same effect as that of his executors; and the cause had been heard in the same manner as it was; the bill against him (I conceive) ought to have been dismissed. For, surely, when an executor has settled all claims against his testator's estate, (of which he had notice,) and has settled his accounts with the Court which granted the probate of the will, and made distribution, he ought not to be affected by any dormant equitable claim, which may rise up against his testator's estate, at any distance of time afterwards. Much less ought his executors, who, under such circumstances, cannot be supposed to be conusant of the affairs of the first testator, as the present defendants expressly state in their answer. And, yet, the decree

in the present case must be understood as against them for nearly 800%. On this ground, therefore, I consider the decree as palpably erroneous.

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Objection. *Clanton* appointed his wife *Sarah* (now the defendant *Sarah Whitehorn*) his executrix, together with *Lofsten* and *Bailey*, his executors.

But she did not qualify; they did; and, on her marriage with *Whitehorn*, which was previous to the commencement of this suit, she forfeited every benefit under her husband's will. And it does not appear that she renounced the will, nor that she ever qualified as *Clanton's* executrix. The decree, therefore, which, in its terms, imports to direct the executors of the said *John Clanton*, "out of his assets in their hands to be administered, to pay to the complainants the money reported by the Commissioners to be due, for the hire of the slaves, and the sale of the land," must be understood (I conceive) as against the executors of the surviving executor of *Clanton*.

Objection. The executors, before distribution made, ought to have taken an indemnifying bond of the distributees to answer any future debts or demands against the testator's estate.

I do not know that the law requires this of an executor. In the case of an administrator, the law will not compel him to make distribution, until bond with security be given, by the distributees, to refund their proportional parts of any future debt or demand against the estate. This is a security which the law gives to the ADMINISTRATOR; but as it does not give it to the executor, and as he is bound to perform the will, I am not prepared to say that he can refuse to pay a legacy, or to make distribution of the residuum, unless the legatee or distributee will give him a similar bond. *Walden v. Payne*(a) is to that effect. Be that as it may, the complainants in this cause have followed the effects of *Clanton* into the hands of his children,(b) and for aught that appears to the contrary, they are the proper persons, not only to make restitution of the slaves, but compensation for their hire. The question then recurs, from what period ought they to be charged with it. And my opinion is, that they ought not to be charged with the hire of the slaves, or with the interest on the sales of the land, until the commencement of this suit. For, first, this is a dormant equity, of which these defendants, who are infants, cannot be presumed to have had any notice; nor, if they

(a) 2 Wash.  
7.

(b) Vid. Burn-  
ley v. Lam-  
bert, 1 Wash.  
312.



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had, could they, or their guardian in their behalf, have given up the slaves or paid their hire. For neither the infants themselves, nor their guardian, were competent to do this of their own mere motion, without the authority or direction of a court. *Secondly*, they could not know *to whom* to make restitution or payment; there being no legal personal representative of *Howell* until a short time before the suit brought. And surely, there is as much reason to adopt this rule, in this case of a *dormant equity* against *infants*, as in the case of a *widow* who comes into a Court of *Equity* to demand her *dower*; in which case the rule seems to be, that she shall not be allowed for the rents and profits which accrued previous to the filing of her bill; although, *at law*, she is entitled to recover damages, equal thereto, from the time of the husband's death until the day of the judgment, whereby she recovers *seisin* of her *dower*.<sup>(a)</sup>

(a) 1 Rev.  
Cours, c. 94.  
p. 4.

Admitting, then, that the complainants are entitled to a decree in their favour, this decree appears to me to be manifestly erroneous, for the reasons last mentioned. It ought, therefore, (in any event,) to be reversed, I conceive, and sent back to be reformed by the Court of Chancery, agreeably to the preceding principles.

Judge ROANE observed, the case appeared to him so plain on the testimony and principles of law, that he did not think it necessary to give a detailed opinion. He then read the decree of the Chancellor, and said; so far the decree relates to and decides upon the *principles* of the cause, and I can only say, that, on examination of the record, most, if not all, the positions taken by the Chancellor are correct. If the decree, so far as it respects the *account*, depended upon the report only, perhaps I might not be disposed to sanction it; on account of the incompetency of some of the parties to consent before the Commissioners: but it appears from the decree of the County Court that the defendants not only made no objection, but *approved of the report*.<sup>(1)</sup> With respect to interest on hire of negroes, I can-

(1) Note. In a subsequent case of *Clarke and White, Executors of White, v. Johnson and others*, June 12th, 1811, the Court (consisting of Judges ROANE, BROOKE, and CASELL) unanimously decided, that reports of Commissioners, which are *not erroneous upon the face of them*, shall not be impeached in an appellate Court, (where *not specially excepted to* in the Court below,) "on grounds, or in relation to subjects, which may be affected by extraneous testimony." In that case the question was, whether interest ought not to have been charged against

not conceive it to be improper on general principles. Negroes are generally hired, taking bonds payable at the end of the year; which bonds carry *interest*, if the money be not paid; and "it is natural justice that he who has the use of another's money should pay interest for it." (a) I should therefore be of opinion to *affirm* the decree *in omnibus*, except (the executors having, perhaps, parted with the estate) to correct it so as to make the property liable in the hands of the legatees.

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(a) 2 Call,  
102. Jones v.  
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Judge FLEMING. With respect to the principal point in controversy, to wit, the invalidity of the deed from *Howell* to *Clanton*, I have no doubt, for the reasons stated in both decrees of the Courts. 1. The extreme weakness of intellect and want of capacity in *Howell*, (though not a *perfect idiot*,) manifested by the depositions of a number of witnesses, who were acquainted with him from his early infancy, and, particularly, the rejection of the first deed (offered to be recorded in *Sussex* Court) from the magistrates' personal knowledge of the imbecility of *Howell's* mind; 2. The consequent *undue influence* *Clanton* had over him, which appears through the whole course of the transactions; and especially in his prevailing on him to join in the absolute sales of the land to *Milner* and *Micajah Hines*, in *October*, 1786; when a principal and most important covenant in the deed of 1783 was, "that in case the said *William Howell* should thereafter intermarry, that the said estate above conveyed, as well land as slaves, with the increase of the said slaves (if any) should revert unto the said *William Howell* and his wife, during their joint and several lives," &c. And, if such an event had taken place, after the sales in 1786, he would not have had a *hovel* to shelter his wife from the inclemency of the weather; 3. The inadequate considerations in the deed; besides *Clanton's* subsequent harsh and ungenerous treatment of *Howell*, very different from what was

*White's* executors, in the settlement of their administration account by Commissioners, in a suit brought against them by the legatees. The Commissioners made no charge of interest; (without assigning any reasons;) and, no exception being taken to their report, the County Court decreed accordingly. The Chancellor reversed that decree, and allowed interest against the executors. But this Court reversed his decree, and affirmed that of the County Court; declaring, in the decree of affirmance, "that the report, so far as it related to the interest claimed against the appellants, was of a nature to be affected by extraneous testimony, and, not being objected to, was conclusive between the parties."

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stated as a consideration therein. It was, however, contended by the appellants' counsel, in the argument, that that circumstance, if true, ought to have no influence with the Court: but, to me, it appears a circumstance among many others, to shew that the principal object of *Clanton* was to secure to himself the estate, and, after he had effected his purpose, he cared very little what became of *Howell* himself; which, in a case like this, has, I confess, considerable weight with me.

But it appears to me that the decree is erroneous in allowing interest on the hire of the slaves; and, on that ground, the decree in the case of *Dilliard v. Tomlinson* was lately reversed in part, by this Court: and the reasons for disallowing the interest in the case before us appear much stronger than in that case. Here the slaves came to the possession of infants under the will of their father, *John Clanton*, upon the marriage of his widow *Sally Clanton* with the appellant *Whitehorn*, several years (but how long doth not appear) before the commencement of this suit; and, though I am of opinion that those who have had the benefit of the negroes' labour, ought to pay a reasonable hire for them, they ought, according to precedents of this Court, and especially in this particular case, to be exonerated from the payment of interest, as it does not appear that the negroes were ever actually hired out; and the contrary is to be presumed; but the Commissioners justly thought proper to charge a reasonable hire for their labour in the possession of the legatees, under *John Clanton's* will.

I have, also, a doubt with respect to the correctness of the decree in ordering that the executors of *John Clanton* do, out of his assets in their hands to be administered, pay to the complainants the sum reported to be due for the hire of slaves, &c.

It appears by the record that *John Clanton*, who died before the 2d of September, 1790, appointed two executors who qualified, and that the survivor of them (*Michael Bailey*) died, and made the defendants *Benjamin Wyche* and *James C. Bailey*, his executors; who, in their answer, say, that their testator, the surviving executor of *John Clanton*, had, previous to his death, fully closed and returned to *Sussex* Court a statement of his executorial accounts, and conceive that the complainants have no cause of complaint against them; they being entirely ignorant of any fraud or iniquity, and pray to be dismissed with their costs, &c.

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As it appears, also, from this answer, that no part of *John Clanton's* estate ever came to *their* hands, their testator, as surviving executor of *Clanton*, having closed and returned his executors' account to *Sussex* Court many years before the commencement of this suit, can it with propriety be said that they have in *their* hands any assets of *John Clanton* unadministered to pay the sum of money decreed to the complainants?

It seems to me, therefore, that an account ought to be taken, and that the legatees of *John Clanton* pay their ratable proportion of the money due, for hire of negroes, and on the sales of the land, with interest at 5 per centum per annum, on the latter from the death of *William Howell* to the time of payment.

The following was entered as the decree of the Court. "A majority of this Court is of opinion, that the said decree of the Superior Court of Chancery is erroneous in affirming the decree aforesaid of the said County Court, whereby it was adjudged and ordered that the appellants, executors of the said *John Clanton*, deceased, out of his assets in their hands to be administered, should pay to the appellees the sum of 772*l.* 17*s.* 11*d.* 1-2. it appearing by the report of certain Commissioners appointed by a decretal order of the said County Court of *Sussex*, made the 4th day of *February*, 1803, to make up and state an account to the Court of the reasonable hire of the slaves, named in a deed in the proceedings mentioned from the death of the said *William Howell* to the time of their report, that the sum of 103*l.* 1*s.* 2*d.* 3-4. part of the said sum of 772*l.* 17*s.* 11*d.* 1-2. reported by the said Commissioners to be due from the appellants to the appellees, was charged for interest on the hire of the said slaves from the 1st day of *January*, 1791, until the 1st day of *October*, 1804; which said report was approved and established in the whole by the said County Court. Therefore it is decreed and ordered, that the decree aforesaid of the said SUPERIOR COURT OF CHANCERY BE REVERSED and annulled; and that the appellees, administrators of the said *William Howell*, out of his goods and chattels in their hands to be administered, if so much thereof they have, pay to the appellants their costs in this Court. And this Court proceeding to make such decree as the said Superior Court of Chancery ought to have rendered; it is decreed and ordered that the decree aforesaid of the said COUNTY COURT BE REVERSED

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and annulled;" "and that the appellees, administrators of the said *William Howell*, out of his goods and chattels in their hands to be administered, if so much thereof they have, pay to the appellants their costs in prosecuting their appeal in the said Superior Court of Chancery. And it is further decreed and ordered that the appellants, in whose possession the slaves in the bill mentioned are, do deliver the said slaves and their increase to the appellees. And, it appearing to this Court by the answers of the defendants *Benjamin Wyche* and *James C. Bailey*, executors of *Michael Bailey*, deceased, who was the surviving executor of the said *John Clanton*, deceased, that their testator had, previous to his death, fully closed and returned to *Sussex* Court a statement of his executorial accounts, (which answers, not having been denied nor replied to, must be taken as true,) it is therefore presumed that the said defendants, executors of the surviving executor of the said *John Clanton*, deceased, can have none of his assets in their hands to be administered. It is therefore further decreed and ordered, that an account be taken of the legacies bequeathed to the other defendants by the last will of the said *John Clanton*, deceased, and that the said legatees pay to the appellees their respective ratable proportion of the balance of the said 772l. 17s. 11. 1-2d., after deducting the said sum of 103l. 1s. 2d. 3-4. charged in the Commissioners' said report for interest on the money due for the hire of the slaves. And the cause is remanded to the said Superior Court of Chancery for further proceedings to be had therein, agreeably to the principles of this decree."

Argued at  
March Term,  
1810.

Greenhow, principal agent of the Mutual Assurance Society, against Barton.

A MOTION was made in the County Court of *Spottsylvania* against *Seth Barton*, on behalf of *William Price*, Cashier of the

1. *Quere*, whether the purchaser of property, for which a declaration, in the Mutual Assurance Society against fire, has been made by the vendor, be liable for the premium; no policy of insurance having been issued, and no notice, of such declaration, given, until after payment of the purchase-money? And, if he be liable, is the proper remedy against him by motion in a summary way, or by action at common law?

2. *Quere*, also, is the property declared for liable, in the possession of the purchaser, who bought, and paid for it, without notice of such declaration.

"Mutual Assurance Society, against fire on buildings of the State of Virginia," and judgment rendered for 117 dollars and 47 cents, for *premiums* under a declaration of insurance made by *John James Maund*, (for whom the property declared for was purchased by the said *Barton*,) with lawful interest, from the date of the declaration, until payment, and costs.

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At the trial in the County Court, a bill of exceptions was signed and sealed, which stated that, "it appearing that *John James Maund* had made a regular declaration, and then sold to *Barton*, and that *no policy* had issued, the Counsel for the defendant moved the Court that no judgment should be entered, inasmuch as the plaintiff did not prove a notice from *John James Maund* to *Barton*, until the purchase-money had been paid; but the court overruled this motion, and gave judgment for the plaintiff."

From this judgment *Barton* appealed to the District Court holden at *Fredericksburg*, where it was reversed, and judgment entered for the defendant. An appeal was thereupon taken to this court, and (*Price* the Cashier having afterwards departed this life) was revived in the name of *Samuel Greenhow* his successor.

*Randolph*, for the appellant, insisted, 1. That, although *no policy* had been executed, the *premiums* on the declaration would have been recoverable, *on motion*, against *Maund*.(a)

2. That *Barton*, the purchaser from him, was equally liable for such *premiums*,(b) and equally subject for the summary remedy by *motion*;(c) and

3. That it was not incumbent on the society to prove that *Maund* gave *Barton* notice of the declaration of insurance.

(a) Acts of  
1794, c. 26. s.  
10. and Acts  
of 1799, c. 30.  
s. 1.  
(b) Acts of  
1794, c. 26. s.  
2.  
(c) Acts of  
1799, c. 30. s.  
1.

*Nicholas*, for the appellee, did not controvert the first of these positions; but contended that *Barton*, the purchaser, (not having received notice before he paid the purchase-money, and no policy having issued,) was not liable for the *premiums*; and that *John James Maund* alone was.

Wednesday, April 18. The Judges ROANE and FLEMING (Judge TUGHER not sitting in the cause) pronounced their opinions.

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Barton.(a) 2 Rev.  
Code, App.  
(No. VII) p.  
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Judge ROANE, after stating the case. It is not necessary, in this case, to inquire, whether a judgment for the *premiums* could not have been legally obtained against *Mauud*, personally, by motion or otherwise; nor whether *the land in question* could not be made liable in the hands of the appellee, for the sum recovered; nor even whether the appellee himself is, or is not liable personally therefor, if proceeded against by a regular suit at law, or bill in equity: nor is it necessary to inquire, whether if a remedy *by motion* had been given against the purchaser from a subscriber, it would have been a good defence against that motion, that the Society had not given the notice to the purchaser which is made the ground of the defendant's objection in the County Court. In the actual case before us, a plainer and broader question arrests us at the threshold; and that is, whether a summary judgment can be rendered against *the purchaser from a subscriber*, for a *premium* upon property which, although declared for, is *not insured*, by reason that the said *premium* has not been paid? The 8th sect. of the act of 1794, (a) relating to the liability of purchasers and mortgagees, is undoubtedly confined to cases of property, the *insurance* of which has been *perfected*, by the payment of the *premiums*. The term "subscriber" mentioned in the latter part thereof, must be construed to mean "*member*;" both because the property, which the section was contemplating in the first part thereof, is "*property insured by virtue of the act*," (which is not the case of property merely *declared for*;) because this same idea is kept up by the part of the section which makes it incumbent on the person transferring, to apprise the purchaser of *the assurance*, and endorse to him or them *the policy* thereof; and because, in the last part of the said section, the property is declared to be liable for "*the quotas*," (and not the *premiums*;) and therefore is to be confined to cases in which *quotas* only are due, or in other words, to cases in which *policies* have issued. The same, or a correspondent interpretation must be given to the term "*subscribers*" mentioned in the 6th section; which section, also, (upon the whole context thereof,) relates only to property of which the *assurance* has been *perfected*. With respect to the 10th section, it relates *expressly*, it is true, to "*subscribers*" (*i. e.* such as have not paid their *premiums*;) and makes *them* and their property liable for the payment of such *premiums*; but there it stops: it neither gives a

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Remedy by motion against such subscribers, nor gives any remedy at all against the purchasers from such subscribers. These two essential ingredients are not to be found in this act, nor in any other act, that I have been able to discover; however the general liability of purchasers may stand, on grounds *dehors* the particular acts of our Legislature. With respect to this remedy by motion, it was first given to the fire company by the act of 1799, c. 30.(a) The preamble thereof states the justice and expediency of giving an immediate recovery against "delinquent subscribers or members;" and the enacting clause is only commensurate therewith, and does not go further: this remedy is not given by that act, or any other, against those who claim under subscribers, by purchase, or otherwise. The testimony of this Court has been often emphatically borne against the extension of summary remedies. In the case of *Asberry v. Calloway*,(b) it was held, that an act of Assembly directing judgment to be rendered for the principal sum, with which a Sheriff was chargeable, and the damages, and not for the penalty, to be discharged by such payment, ought "to be strictly pursued; on the ground of being a new remedy contrary to the course of the common law;" although it is not easy to be discerned that the defendant could have been injured by the deviation, and, if not so injured, would not (in other cases) have been entitled to succeed upon an appeal, under the decisions of this Court; and, in the case of *Anderson v. Bernard*,(c) the Court was divided on the question, whether a Sheriff could justify making a distress on account of fees due to "A. C. deputy clerk," on the ground that the law only allows distresses for fees due to Clerks. Various other instances might be added to the catalogue; but I presume it requires no further proof to shew that a man is not to be ousted of his ordinary and constitutional mode of trial, unless (at least) it be by an express legislative declaration, or by a constructive declaration so strong as to leave no doubt of the meaning of the legislature, that another remedy should be substituted. On this ground, I am of opinion, that the judgment of the District Court reversing that of the County Court is correct, and should be AFFIRMED.

(a) 2 *Rec.  
Code, App.  
(No. VII.)* p.  
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(b) 1 *Wash.74.*

(c) 1 *Wash.*  
177.

Judge FLEMING. Two questions were made by the appellant's counsel in this case. First, whether *Maund* would have



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been liable, and subject to a judgment on *motion*, had the transfer not been made? and, if so, *secondly*, whether *Barton*, who purchased from him, be not equally liable?

As to the first point, whether *Mauud* would have been liable, and subject to a judgment on *motion*, it seems admitted by the appellee's counsel, as being too clear to be controverted. With respect to the second point, whether the *appellee* be equally liable, it requires more consideration. Let us recur, first, to the act of Assembly, passed in *December*, 1794, establishing the *Mutual Assurance Society*, and a subsequent act of 1799; and, *secondly*, to the objections stated in the bill of exceptions, taken at the trial in the County Court of *Spottsylvania*.

By the 8th section of the act of 1794, "subscribers selling, mortgaging, or otherwise transferring such property, shall, at the time, apprise the purchaser or mortgagee of such assurance, and endorse to him or them the *policy* thereof; and, in every case of such *change*, the purchaser or mortgagee shall be considered as a *subscriber*, in the room of the original; and the property so sold, mortgaged, or otherwise transferred, shall still remain liable for payment of the *quotas*, in the same manner as if the right thereof had remained in the original owner."

By the 10th section, "the *subscribers*, in default of paying the *premiums*, at the times fixed therefor, shall, on the request of the *cashier*, be compelled to pay the same, with six *per cent.* interest thereon, to the day of payment," &c. By the 8th section, "in every case of such *change*," (that is, by sale, mortgage, or other transfer,) "the purchaser or mortgagee shall be considered as a *subscriber*, in the room of the original;" and, in my conception, subject to all regulations, judgments and penalties, that the original subscriber would have been subject to, had such change or transfer never been made: otherwise, the frequent sales, or transfers of assured property would greatly tend to abolish the institution altogether.

The act of *January*, 1799, gives to the society power to recover, on *motion*, the whole, or any part, of such *premiums* or *quotas*, of delinquent *subscribers*, "*saving the trial by Jury, if required;*" and, under the 8th section of the act of 1794, I consider *Barton* a *subscriber*, so far as respects the *premium*; but, no *policy* having ever issued, he is *no farther* liable. And he

had an option to be tried by a *Jury*, but declined it; and therefore had no cause to complain of the summary proceeding.

Let us next consider the *objections* stated in the bill of exceptions, taken at the trial in the County Court. First, that no *policy* had ever issued on the declaration, or subscription of *Maund*. And, secondly, that the plaintiff did not prove a *notice* from *Maund* to *Barton*, who purchased the property of him, until the purchase-money for the same had been paid.

The reason why no *policy* had issued to *Maund* was, that he had never paid the *premium* on which the *policy* should have issued; and therefore was not entitled to one; and that *premium*, still in arrear, is the subject of this controversy. The want of a *policy*, then, (by no means imputable to the *society*) cannot, in my conception, affect the merits of this case.

The circumstance, however, of the assurance being incomplete, exempts the *property* from being bound for the *quota*; but does not, I conceive, exempt the appellee from being personally responsible for the *premium*. "But," says the bill of exceptions, "there was no proof of *notice* from *Maund* to *Barton*, at the time of the purchase, nor until the purchase-money had been paid." And the counsel relied on the *general* principles of law, equity, and *fair dealing*, respecting the subject of *notice*; but *general* principles do not apply to the case before us. Neither law, equity, nor *fair dealing*, requires that to be done, which, from the nature of things, is impossible. The plaintiff, in *Spottsylvania* Court, was required to prove a *notice* from *Maund* to *Barton*, at the time of the transfer, when it was impossible that he, or the *society*, whose agent he was, could have any knowledge of the transaction between them. And such transfers frequently take place at the distance of some hundreds of miles from the office of the society. The law requires, indeed, that the *seller* of insured property shall, at the time of the transfer, apprise the purchaser of such assurance, &c. "to the end," says the preamble of the clause, "that purchasers of property insured by the act, may not be losers thereby," which is a matter merely between the *seller* and *purchaser*; and if *Maund*, in the case before us, failed so to apprise the purchaser, the society should not be responsible for, nor injured by, the neglect: but the *appellee* must have recourse to the representatives of *Maund* for redress of any injury he may sustain in consequence of the omission.

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On these grounds, I am of opinion that the judgment of the District Court ought to be reversed; and that of the County Court affirmed. But the Court *being divided*, the *latter* judgment must be **AFFIRMED**.

Tuesday,  
May, 29.

Smiths *against* Ambler and others;  
and

Smith and Weaver *against* the same.

1. A landlord is not entitled to the summary remedy by motion, on a three months replevin bond; unless it appear that such bond was taken by a Sheriff, or other officer legally authorized to make distress, and to sell the distrained effects.

2. A landlord, in person, or by a private agent, may levy a distress; but cannot sell the distrained effects, which, in such case, are only to be held as a pledge, to compel the tenant to pay the rent.

THESE two cases were argued and decided together. In each a judgment was obtained *on motion*, (the parties being heard by their attorneys,) in the County Court of Fauquier, on a three months replevin bond, dated the 3d of May, 1804; the condition of which recited, that, "whereas Ambler and others, heirs and devisees of John H. Norton, had distrained upon the goods and chattels of the above bound (Augustine Smith, in one instance, and James Smith in the other) for rent in arrear and due on the land of Effingham-forest, in the County of Fauquier, amounting to the sum of (63l. 16s. 4d. 1-2. in one instance, and 58l. 15s. 10d. 1-2. in the other) including all costs to this date, which said goods and chattels have been again restored to the said Smith in consequence of entering into this bond," &c.; without stating, in any part of either bond, that the same was taken by a Sheriff or other officer. Both bonds were witnessed by "James Edmunds, D. S."

The judgments in question were affirmed by the District Court holden at Haymarket; and writs of *supersedeas* to both were awarded by a Judge of this Court.

The petition for the *supersedeas* assigned three errors in each case; 1. That it did not appear by the replevin bond what was the amount of *rent due* for which the distress was made;

2. That it did not appear, from any thing shewn by the proceedings, what were the *costs* charged by the persons levying the said distress, which are said to be included in the condition of the said bond; and,

3. Because it appears by the condition of the replevin bond that the said distress was made by the obligees, to whom the

rent was payable, *in person*, and not by any *officer* who could have been authorized to make *sale* of the property distrained.

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*Botte*, for the plaintiffs in error, did not waive the *two first* points, but pressed the *third*, as sufficient to reverse the judgments.

*Call*, contra. The act of Assembly, (a) it is true, speaks only of the "*Sheriff or other officer* serving the distress;" though by the common law, distress might actually be made by the landlord himself; and the constant practice is for him to give a warrant of distress. But that is no question in the present cases. The defendants made no objection on that ground, so as to enable the plaintiffs to shew that, in fact, the distresses were served by an officer. The court will intend that all the requisites of the law were complied with, since the contrary does not appear; especially when it appears that the general tenor of the law has been followed. On the same principle this Court affirmed a judgment on a forthcoming bond, in which *no security* had been given. (b)

(a) 1 Rev.  
Code, p. 163.  
c. 89. s. 1.

(b) 3 Call, 14.  
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*Wickham*, in reply. As I understand the law, though the landlord may distrain in person, he must, in that case, proceed according to the course of the common law. He must hold the property as a *pledge*, to compel the tenant to pay the rent; but he *cannot sell*. If he proceeds under the statute, he must employ an *officer*. The tenant has one advantage, he may gain time: the landlord has another, the property may be *sold*. The case of a forthcoming bond (referred to by Mr. *Call*) is not analogous to this. The granting the debtor indulgence, without requiring *security*, was a *benefit* to him; and no man shall be permitted to object to that which is for his own benefit.

I have no doubt but these are good bonds at common law, and actions may be maintained upon them. Suppose no statute had been made; and the tenants had offered security for the money on being indulged three months; the landlord, I apprehend, might have accepted the bonds, and recovered upon them. But he cannot resort to the summary remedy by *motion*, with-

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out strictly complying with the terms of the statute which gives that remedy.

Wednesday, May 30. The Judges pronounced their opinions.

Judge TUCKER. This appeal is from a judgment on a replevin bond taken to replevy goods distrained for rent.

The condition of the bond recites, that the *appellees* (not saying by a *Sheriff* or other officer) had distrained the goods, &c. of the appellant, A. S. for rent in arrear, which had been restored to him in consequence of entering into that bond. There is the name of a witness to the bond, who does not designate himself as an officer; nor is there in the record any thing to shew that the distress was in fact levied by an officer. The County Court gave judgment by the obligees, on *motion*: that judgment was affirmed by the District Court.

The right of distraining for rent arrear is a common law right, which every landlord may exercise *in person*, or by his *bailiff*; that is, by an agent, authorized for that purpose, who might seize any goods or chattels of the tenant found upon the premises. But the distress so taken was, by the common law, only in nature of a *security* for the rent, and could not be sold to make satisfaction. This proving a great inconvenience to landlords, statutory remedies have been provided, both in *England* and in this country; which are nearly the same. Our law declares, that "where any goods or chattels are distrained for rent, if the tenant shall not, within ten days, replevy the same, by sufficient security given to the *Sheriff* or officer serving such distress, to pay the money, &c. such *Sheriff* or officer shall and may sell the goods," &c.

(a) 9 Wash.  
57, 58.

In the case of *Ferguson v. Moore*, (a) Judge LYONS, in delivering the opinion of the Court, said, "It is true that at common law a distress might be levied by any *private* person, authorized by the landlord for that purpose; but it is equally true, that such person, so appointed, had no right to sell the property distrained, or to take a replevy bond." The power of *selling* is given by statute, and can only be done by an *officer*; that is, one duly qualified as such. Now, here, it does not appear that this distress was served, or the bond taken, by an *officer*. We must, therefore, understand it (as the bond seems to import) to have been levied

by the landlord himself, or his *private agent*. To entitle him to the benefit of a statutory proceeding by *motion*, instead of an *action of debt*, the plaintiff ought to have shewn that he had proceeded regularly according to the directions of the statute. That not being the case, the judgment is erroneous, and ought to be reversed.

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The acceptance of a bond for rent (unless taken as the act directs) does not extinguish the *rent*; for that is higher than the *bond*; and, where the tenant gave a note for the rent, and the landlord afterwards distrained for the rent, upon trespass brought by the tenant, it was held that the landlord might nevertheless distrain. Our act of 1748, c. 10.(a) declared, that bonds taken pursuant thereto should have the force of judgments; which shews the great difference the law intended to make between a bond taken by a private person, and one taken by an *officer* pursuant to the statute.(b)

(a) Edit. of  
1769, p. 908.

(b) See Bull.  
N. P. 182.

Judge ROANE. It ought to appear in the bond, in order to justify this summary remedy by *motion*, that it was taken by a *Sheriff*, or *officer* making the distress, in whom confidence is reposed by the act, touching the *amount of the money*, or tobacco, and the costs due, for which the bond is to be taken, as well as respecting the *sufficiency* of the surety to the bond. Where it does not appear to have been the act of the officer, the party himself *may* have exacted bond for more than was due, or been otherwise guilty of duress or extortion: in which case he ought not to have the high privilege of getting judgment in a summary way, and the further privilege that on the execution of his judgment, "no security is to be taken." I will hold the party to a strict, if not literal, compliance of the law, (and that as appearing to *this Court*.) before I extend to him the privilege of the summary remedy.

The case of *Ferguson v. Moore*(a) is supposed to be an authority, that a bond taken under the act in order to warrant a judgment by motion, ought to be taken by an *officer*.

(a) 2 Wash.  
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My opinion, therefore, is, that the judgment be reversed.

Judge FLEMING was of the same opinion.

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BY THE WHOLE COURT, the judgments of the District Court and County Court both *reversed*, and the motions overruled with costs.

Wednesday,  
April 18.

### Moon against Campbell, Executor of M'Donald

1. A vendor of land according to certain lines must be *presumed interested*, and therefore *incompetent* as a witness, to establish those lines, unless it *appear* that he did not warrant the title.

THIS case was argued by *Hay*, for the appellant, and *Wickham*, for the appellee; being an appeal from a decree of the Superior Court of Chancery for the *Staunton* District, by which a decree of the County Court of *Berkeley* was reversed.

The only point of importance was, whether *Magnus Tate*, who had sold the land in controversy to *M'Donald*, the plaintiff in equity, was a competent witness in his favour to establish the lines by which he had purchased from *Tate*, as the plaintiff himself alleged in his bill. The deed from *Tate* to *M'Donald* did not appear in the record; nor was it stated whether it contained a clause of warranty or not. *Wickham* contended, that the party attempting to impugn the competency of the witness, ought to *prove* that he warranted the land according to the lines in question. On the other side it was insisted, that *prima facie* the witness was *incompetent*; and that the burden of proof lay on the party who wished to avail himself of his testimony.

Saturday, May 12, 1810. The Judges delivered their opinions.

Judge TUCKER. This cause, which has been eight and twenty years nearly depending, had its origin in a tortious partition and sale of lands held in joint-tenancy between *James Moon*, of full age, and *Jacob Moon*, an infant under the age of twenty-one years, by the former, without the consent of the latter. The partition is alleged to have been made some time in the year 1755; and the metes and bounds are particularly set forth in the bill. In June, 1755, *James Moon* conveyed the part which he had allotted to himself, and which, by a survey made in the cause, is found to contain 504 acres, to *Magnus Tate*, by deeds of lease and release, leaving to his younger brother 292 acres, as his

moiety of a tract which contained 796 in the whole. *Tate* in the year 1762 sold to *Andrew M'Donald*; by whom the original bill was brought, twenty years afterwards, against *Jacob Moon*, the younger brother, to compel him to confirm the partition so made, and to release all claim, &c. to that part of the whole tract, which is comprised within the lines above described. The grounds of equity stated in the bill are, that the partition was made by *Henry Bowene*, *Jacob's* guardian; and that when he came of age he (*Jacob*) pretended to call in question the justice of the decision, and threatened to compel another partition of the land; whereupon *Magnus Tate* (with the consent of *James*, the elder brother, who agreed that the same should be deducted out of the price of the land) agreed with *Jacob*, that he should release to him all claim which he might have to the before described land (stated to contain 337 1-2 acres, or an exact moiety of the lands as held by the patent) in consideration of 11*l.* current money, which *Tate* actually paid him.

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The answer of *Jacob Moon* denies that *H. Bowene* was his guardian, or that any such division as in the bill is set forth was ever made with his (the respondent's) consent and approbation; and declares that he believes *James Moon* made such a conveyance as in the bill mentioned to *Magnus Tate*; but expressly denies that he ever agreed to such a division, as in the bill is set forth; only so far as it went through the CLEARED LAND according to the line first run, which is now much altered, and greatly to his injury and disadvantage; that in consideration of his agreeing to what is in his answer set forth, he received the 11*l.*; and that he is, and always has been, ready to make a fair, just and equitable division, &c.

*Magnus Tate* (whose deposition, on account of apparent interest, was objected to be read at the hearing) deposes, that he purchased a tract of land from *James Moon* for 337 1-2 acres; being HALF of the tract held jointly between *James* and *Jacob*; and, having it divided before *Jacob* came of age, a dispute arose; *Jacob* alleging that *James* had laid off more upon the water than was his right; and that they agreed, after *Jacob* came of age, and *James* paid *Jacob* 11*l.* in consideration of confirming the line laid out by *James* for the deponent; whereupon a deed was made and executed by *James* to himself.

*Benjamin Thornbury* deposes nearly to the same effect. An



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other witness, *James M'Donald*, swears that *Jacob Moon* frequently shewed him the line, and observed it was the division line between himself and the witness's father, the complainant. These are all the witnesses on the part of the plaintiff. Two witnesses depose to conversations between *James* and *Jacob Moon*, which go to support that of the answer, which restrains *Jacob's* agreement to the line run, to that part which went through the cleared land.

I have already said, that the commencement of this dispute was founded in a tortious attempt by one joint-tenant, of full age, to sever the joint-tenancy by an unfair and unequal partition during the infancy of the other joint-tenant. The deeds, as set forth in the bill, import to convey an *equal moiety* by metes and bounds: and *Magnus Tate's* deposition is to the same effect.

The infant probably was *deceived* into a supposition that the line run did in fact divide the land into two *equal parts*; though his own observation, as far as the cleared land went, shewed him that his brother had taken to himself the far greater proportion of the most *valuable* land. His complaint was confined to *that object*, probably not knowing, or even suspecting, that his brother, instead of one half, had taken more than five eighths of the whole tract to his own share. There was either *fraud*, or palpable *mistake* on the part of *James* and *Magnus Tate*. There was evidently *misrepresentation* on their part to *Jacob*; since the deeds import to convey a *moiety only*. There was consequently *mistake* on the part of *Jacob*, induced by *misrepresentation* on the part of his brother, and of *Tate*. The complainant does not pretend that he was a purchaser without notice. He must therefore be presumed to have notice of all that he has stated in his bill. I think the answer clearly and fully supported by circumstances, as well as by the evidence of the two *Browns*. The objection to *Magnus Tate's* deposition also appears to me to be well founded. For, if there was originally any fraud in the case, he can scarcely be presumed quite clear of it. At all events, his being both the purchaser and the seller of the lands creates a presumption, *prima facie*, that he is interested in the event of the suit. There is nothing in the record to countervail that presumption. I therefore think the Chancellor's decree erroneous, in reversing that of the County Court directing an equal partition of the lands to be made; beginning at the point

A. in the plat returned by the surveyor, and pursuing the line A. B. as far as the same *went through the cleared lands*, at the time of the agreement made between *James* and *Jacob*, and, from that point, to the back line of the lands, along the dotted line B. E. in the plat, so as to divide the same into two equal moieties; assigning to the complainant the lands on the north, and to the defendant those on the south of that line; and that the remainder of the decree, as far as is consistent with such a division, be affirmed, and the cause sent back to be proceeded in accordingly.

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Judge ROANE. It appears, as upon the face of the bill itself, that *M. Tate* was an incompetent witness, as he is therein said to have conveyed the land in controversy according to the lines claimed by the appellees, and was therefore *interested* to establish them. I do not know, however, that the result of my opinion on the case, would be varied, admitting his testimony to have its full weight: or, in other words whether his testimony may not be reconciled with the statement made in the answer (after a denial of the division as stated) and proved by other testimony, and be satisfied with considering the line to have been established only from A. to B., after *James Moon* came of age; and, being established up to that point only, as by the answer and testimony, it resulted that the partition line should be completed, so as to divide the tract into two equal parts, which is done by the dotted line B. E.

It may be very probable, independently of the testimony in the cause, that the line was actually run up to a certain point only, and an ideal line contemplated by the parties for the residue, so as to make an equal division: and *this* notwithstanding the payment of the 11<sup>th</sup> to the appellant; which may have found its consideration in the superior value of the land (or the improvements thereon) contained on the other side of the line so far as the same was run. I therefore consider the decree of the County Court correct on the merits, and that so far as it decrees *releases*, it is a decree of mutual and simultaneous releases.\* It was not

\* Note. The decree of the County Court was, "that the defendant execute a release to the plaintiff for the land to which said *M. Donald* claims title to the north of the said lines A. B. and B. E., containing one half the tract in the bill mentioned,

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In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein; without making such person a party to the suit.

necessary to make the representatives of *James Moon* parties in order to this end; nothing being more common than for one man to covenant that *another* shall do a particular act, and for the Court of Chancery to decree that one man shall procure an act to be done by another, as the condition of the relief which is granted to him.

My opinion is, that the decree of the Chancellor be reversed, and that of the County Court affirmed.

Judge FLEMING. It appears from a survey and plat made under an order of the County Court of *Berkeley*, that the tract of land held by *James* and *Jacob Moon* in joint-tenancy, which is now the subject of controversy, contains 796 instead of 675 acres, the supposed quantity at the institution of this suit.

It appears from the evidence in the record, that *James Moon*, the elder brother, during the infancy of *Jacob*, the appellant, made a partial, and unequal division of the land; sold and conveyed his moiety to *Magnus Tate*; and (what seems very material) took an over proportion of the improvements, and most valuable land lying on *Middlecreek*; of which *Jacob*, when he came of age, complained, and threatened to compel another division of the land; and that he, for the consideration of eleven pounds, consented to the division made by his brother *James*; so far as it extended through the cleared lands; which is supposed to be from the letter A. to the letter B. in the said plat, but no farther.

The decree of the County Court of *Berkeley*, after the return of the survey and plat, rendered the 8th of *May*, 1798, ordered, "that the line from A. to B. and from B. to E. be established as the division line," which should give to each party 398, being a moiety of the whole tract of 796 acres; and directed an exchange of releases between the parties; which I am of opinion was perfectly correct. But this decree was reversed by the District Chancery Court of *Stawnton*; which decreed and ordered, that the appellee (the appellant here) do release unto the appellant his right to the land north of the line A. B. mentioned in the said transcript, and that the appellant release to the

amounting to 398 acres; and that the said *McDonald* shall execute a release, and procure the said *James Moon* to join him in such release, to the defendant for the land to the south of the division lines aforesaid."

appellee all the land south of the said line, &c. which would give to the present appellee 504 acres, and leave to the appellant 292 acres only. I therefore concur in the opinion that the decree of the Superior Court of Chancery ought to be reversed, and that of the County Court affirmed.

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Glascok's Administratrix against Dawson.

Wednesday,  
May 23.

JOHN DAWSON obtained a judgment in the County Court of Lancaster against Catharine Glascok, administratrix of George Glascok, deceased, for 130 dollars and 19 cents damages, and 49 dollars and 40 cents costs; which judgment was affirmed by the Northumberland District Court; the damages allowed for retarding the execution thereof by the appeal being 24 dollars and 10 cents, and 6 dollars and 87 cents costs. A writ of *fieri facias* issued, commanding the Sheriff that, of the goods and chattels of the decedent in the hands of the administratrix, he cause to be made the above-mentioned sums recovered in the County Court; and of her own goods and chattels the damages and costs adjudged in the District Court. The return on this execution was "executed on one negro woman and child, the property of the within named Catharine Glascok, and forthcoming bond taken," &c. The bond expressed that "Catharine Glascok, administratrix of George Glascok, deceased, and her security, were held and firmly bound, &c. in the penalty of 445 dollars and 50 cents; to which payment they bound themselves, their heirs, executors, &c. jointly and severally. Its condition recited that the writ of *fieri facias* had been sued out against the goods and chattels of Catharine Glascok, administratrix of George Glascok, deceased, for the sum of 211 dollars and 56 cents, together with the sum of 10 dollars and 59 cents for Sheriff's commission, and sixty-two cents for taking this bond, amounting in the whole to the sum of 222 dollars and 75 cents, which writ had been executed on a negro woman and child, (without saying to whom they belonged,) and the said Catharine Glascok, being desirous of keeping the said property in her possession till the day of sale, &c. hath given bond, &c.

A judgment was rendered on this bond in general terms, against Catharine Glascok, administratrix of George Glascok, de-

1. A writ of *fieri facias* against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and as to other damages and costs of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a forthcoming bond taken," &c. The bond being given by the administratrix, *ex nomine*, but expressing that the *f. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *f. fa.* and therefore quashed.

2. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken.

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ceased, but not expressing that any part thereof was to be satisfied out of the goods and chattels of the decedent in her hands to be administered, to which judgment a writ of *superseas* was awarded by a Judge of this Court.

Warden, for the plaintiff in error, made four points; 1. That the execution was erroneous in directing the damages and costs, incurred by the appeal to the District Court, to be levied of the goods and chattels of *Catharine Glascock herself*; 2. That it was improperly levied for the whole amount, on two slaves, the property of the said *Catharine*; 3. Because the Sheriff oppressively inserted in the condition of the forthcoming bond, not only his commission, but also a fee for taking the same bond; and, 4. Because it appears by computation that the condition of the forthcoming bond requires more money to be paid than is warranted by the execution independently of these two items.

*Nicholas, contra.* The judgment for damages and costs to be levied *de bonis propriis* is correct. The appeal was the individual act of the administratrix, for which therefore she ought herself to be charged, and not the estate of her intestate. (a) The case comes up on a judgment on a forthcoming bond; by entering into which she bound herself individually. If the property was not liable, she ought to have contested the right: but, by giving the bond, she is now estopped. (b)

The Sheriff's commissions were properly included in the bond. (c)

Friday, May 25. The Judges pronounced their opinions.

Judge TUCKER (after stating the case) observed: It is the duty of the Sheriff to pursue the directions contained in the execution. The execution commanded him to levy the damages on the goods and chattels of *George Glascock*, deceased: the forthcoming bond recites an execution as having issued against, and been levied on, the goods and chattels of *Catharine Glascock*, administratrix of *George Glascock*. There is a variance, then, between the execution and the forthcoming bond, which is fatal. (d) For the Sheriff might have levied an execution, on the goods and chattels of *CATHARINE Glascock*, corresponding

(a) *Teller's Law of Executors*, 296.

(b) *Syme v. Montague*, 4 H. & M. 180.

(c) 1 Rev. Code, c. 176, s. 11. p. 366.

(d) 1 Wash. 259. *Hubbard v. Taylor*. 2 Wash. 189. *Downman v. Chinn*.

with the description thereof in the forthcoming bond. The judgment therefore appears to me to be erroneous, and it ought to be reversed, and the forthcoming bond quashed.

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1810.

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Judge ROANE: This is a *supersedeas* to a judgment of the District Court upon a forthcoming bond. The judgment was for 445 dollars and 50 cents, the penalty of the forthcoming bond to be discharged by the payment of 222 dollars 75 cents, with interest from July 31, 1805, till paid, and the costs. The style of the judgment as headed in the record is against *Catharine Glascok*, administratrix of *George Glascok*, deceased. The bond on which the judgment was rendered is set out in the record, and states that *Catharine Glascok*, administratrix of *George Glascok*, deceased, (with a surety,) is bound to the appellee in the sum of 445 dollars and 50 cents; and the condition states, that whereas the appellee had sued out of the District Court "a writ of *fieri facias* against the goods and chattels of *Catharine Glascok*, administratrix of *George Glascok*, deceased, for the sum of 211 dollars and 56 cents, together with 10 dollars and 59 cents, for Sheriff's commissions, and 62 cents for taking this bond, amounting in the whole to 222 dollars and 75 cents, which has been executed by the Sheriff on a negro woman and child, (without saying whose, but the case of *Lewis v. Thompson*, 2 H. & M. 100. cures that omission,) and the said *Catharine Glascok*, being desirous of keeping the same in her possession till the day of sale, has tendered security, &c. The bond therefore agrees with the judgment, both as to the penalty thereof, and the sum by which it is to be discharged.

Several objections, however, are taken to this judgment, by referring to the execution, which it is admitted may be properly looked into, under the decisions of this Court, in reviewing the judgment upon the bond.

In the first place it is said, that the bond shews that the goods taken were the goods of *Catharine Glascok*, in her own right, and not those held by her as administratrix. If this objection were founded in fact, it might be fatal: but I conceive that it is not founded in fact. In the penal part of the bond she binds herself as administratrix of *George Glascok*, deceased; and, although the condition states that the execution issued against the goods of *Catharine Glascok*, yet it does not stop here, but adds, "administratrix of *George Glascok*, deceased." This annexation in the condition, taken in con-

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nection with the description in the penal part of the bond is satisfactory to shew, that the goods directed by the execution to be taken, were those held by her *as administratrix*, and not her own proper goods. We need not require technical precision in such cases: it is enough that we can discern from the whole bond, taken together, that the property against which the execution issued, was the property liable thereto. In this case we cannot take them to have been *Catharine Glascock's* own proper chattels, without rejecting the annexed words "*administratrix of George Glascock, deceased;*" and I consider this as only an irregular mode of describing the goods of the intestate, *in the hands of his administratrix*: if, therefore, the case stopped here, I should have no hesitation to affirm the judgment.

But it is objected that this bond is illegal, and the judgment on it erroneous, in having *included* in the bond the fee of 62 cents for taking the same. I am inclined to think that the act of 1794<sup>(a)</sup> does not authorize the Sheriff to include in the forthcoming bond, the fee for taking the same, which would probably have been provided for, as well as the *commissions*, had the Legislature intended it: or, if they so intended, it is a *casus omissus* in the act. This being a summary proceeding, execution could only be awarded "for the money or tobacco mentioned in the execution" under the act of 1793,<sup>(b)</sup> and for the commissions (in addition) under the aforesaid act of 1794. It cannot be said that this objection cannot be taken by the appellant, because it is *beneficial* for her: the same answer existed in case of the *commissions*, prior to the act of 1794; and yet it was held that the inserting them was erroneous. It might be equally argued in *both* cases, that it is favourable for a party to give him credit for a sum by including it in the bond, rather than compel it to be paid down.

Again, this *whole* execution issuing against the goods of the *intestate*, as I have supposed, as aforesaid, the appellant in her character of *administratrix* objects that, *by the execution*, a part thereof, viz. the damages and costs on the appeal, were only leviable upon her *proper* estate, as appears by the execution. It is not for us in this case, to investigate that execution, in this particular: the judgment and execution is to be taken to be correct; and, being so, a departure from that execution in the respect in question is *injurious* to the estate of the appellant's *intestate* by levying more upon it than the judgment authorized.

(a) 1 Rev.  
Code, p. 336.

(b) *Ibid.* 298.

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It is of no consequence that both rights happen to exist, in this case, in *Catharine Glascock* solely. The maxim "that, when two rights concur in the same person, they are to be considered as if they existed in different persons," seems in this case to apply; and I can give no other judgment in this case than I should if the persons were entirely distinct, or if *other persons* were associated with *Catharine Glascock* in her character of administratrix.

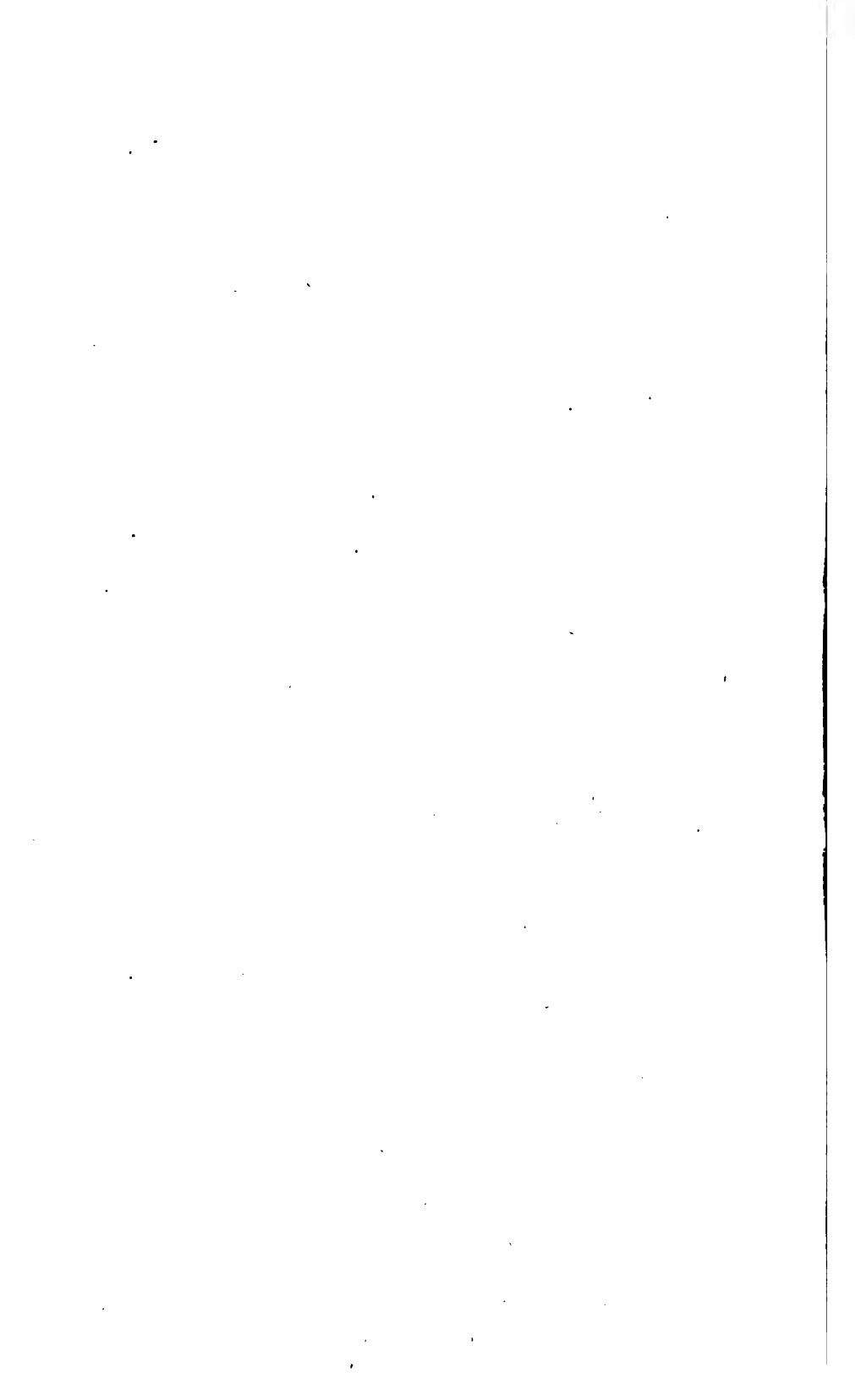
Again, the sum for which this judgment is given exceeds, in a small sum, (say 98 cents,) the "sum mentioned in the execution." I will not *decide*, at present, whether this *single* exception of a trifling error in calculation would be sufficient to overturn this judgment; but I am clearly of opinion that these three last objections taken together must have that effect.

Judge FLEMING. It is the unanimous opinion of the Court that the judgment is erroneous and to be reversed; and it is *my* opinion that the bond, not pursuing the judgment, must be *quashed*.

Judgment reversed, and bond *quashed*.\*

\* Note. In this case, the writ of *feri facias* was made a part of the record without any plea or bill of exceptions; the judgment on the forthcoming bond being by *default*, on a notice proved by a witness, but not inserted in the record.





## APPENDIX.

Judge ROANE's opinion in the case of *Reed v. Reed*.

The principal question arising out of this special verdict is, whether the lessors of the plaintiff, who were born in *Ireland* prior to the year 1770, and who did not become citizens of this Commonwealth, until after the descent of the lands in question, were, at the time of such descent, disabled to take and hold lands within this Commonwealth, and to bring any real or personal action concerning them. Such being the disabilities under which an alien labours by the common law, the question may be more succinctly stated to be, whether, in respect of the lands in question, the plaintiffs are to be regarded as aliens, or not.

I will consider this question,

1st. In relation to the doctrines of the common law of *England*, as handed down to us in the Reports and Treatises on the subject, with no other variation than what arises from the erection of a new government in *Virginia* in 1776.

2dly. I will inquire how far those doctrines are controlled or affected by the principles of the revolution, and the provisions of our constitutional and legislative acts.

And, 3dly. Whether any, and what, effects have been produced on this question, by the treaty of peace of 1783? The treaty of 1794 is entirely out of the question, as being subsequent to the commencement of the plaintiff's action.\*

Under the first view, I will remark, that the terms "alien" and "alien born" are used synonymously in the *English* law books; for it being an established principle of the *English* law, that a subject born can never shake off his natural allegiance, (a) it follows that none are there considered aliens, but those who are born so.

The terms "alien" and "alien born," and "subject" or "citizen," are in their nature relative: and to what else can they have relation; what else is their correlative, but the sovereignty or government where the discussion is?

The question then in this case is, more particularly, whether or not the plaintiffs were, at the time of the descent cast, aliens, in respect of the Commonwealth of *Virginia*?

This idea is entirely borne out by the *English* cases themselves. In *Calvin's* case, (b) the question was, "whether the plaintiff, who was born in *Scotland* after the descent of the *English* crown to *James I.* was an alien born, and, consequently, disabled to hold any real or personal action for lands within the realm of *England*;" (c) but in the same case it was adjudged, that "whosoever is an alien born is so accounted by law in respect of the king;" (d) the question, therefore, in *Calvin's* case was, more particularly, whether he were an alien born, or not, in respect of the King of *England*?

Am I not therefore correct in saying, that the present question is, whether the plaintiffs were aliens or not, in respect of the Commonwealth of *Virginia*?

An idea has sometimes been urged, that all those who are born subjects of the same common allegiance, can never be considered as aliens in relation to each other. (e) I admit the truth of this position in every case where the plaintiff can shew himself to be no alien to the sovereign where he sues; I deny the truth of it, in every other case: in other words, the relation which existed between the two individuals is wholly an immaterial and foreign inquiry. I bottom this position upon *Calvin's* case itself. I have already said, from that case, that an alien born is so accounted, "in respect of the king," and I will now add from the same case, "that this appeareth by the pleading so often before remembered, that he must be extra

(a) *Bl.* 369.  
1 *Rep.* 25. a.

(b) 7 *Rep.* 1.

(c) *Ibid.* 2. a.

(d) *Ibid.* 25. a.

(e) See  
*Wythe's Rep.*  
case of *Farley v. Farley*.

\* Note by Judge ROANE. Since this opinion was delivered, the decision of the Supreme Court of the *United States* in the case of *Dawson v. Godfrey*, 4 *Cranch*, 321. has been rendered; from which it is inferred that the treaty of 1794 would be held not to apply. In that case the descent to a *British* antenata was in 1793; and yet the judgment of the Court was, that she was incapable of taking the lands descended; and this although the case of *Lambert v. Payne*, 3 *Cranch*, 97. in which this point was much relied on by counsel, was considered by the Court in forming its judgment upon the principal case, and indeed superseded another argument. See also note 4 *post*, p. 616.

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*ligentiam domini regis*, without any mention making of the subject." (a) I might further add, from the said case, that "*nec calum nec solum, sed ligentia et obedi-entia*," make the "subject." (b) If allegiance gives the criterion, must we not unavoidably have reference to the government, and decide whether or not this allegiance exists? Under the position now controverted, the universal plea in cases of alienage would be wholly improper; (and well established pleadings are good evidence of the law;) the inquiry would be called off, from the question of allegiance or not, to the question of a common birth between the ancestor and heir, and this absurd consequence would follow that a recovery might be had, in any country, by persons born in any other country and not naturalized in it, the plaintiff making out his case, in this latter respect; the same person might also sustain one action, and fail in another, in the same country, and at the same time, according as the person under whom he claims might, or might not, have been born under a common allegiance with him!!

In *Calvin's* case, (which I principally resort to because it contains the whole doctrine upon this subject,) a definition is given of an alien; and it is, "that he is a subject that is born out of the allegiance of the king, and under the legiance of another." (c) This definition presents to us the only criterion whereby to discern who an alien born is; I say an alien born, because in this country a citizen born may become an alien by expatriation; and, even in *England*, a subject born may become an alien, by the act of the government, though not by his own act.

Much indeed is said, in *Calvin's* case, about the "time of the birth being the essence of a subject born," &c. (d) but it is evident that the time of the birth is no further material, than as explanatory of the principal question, viz. whether born within the allegiance of the king, or not? This principal question, therefore, may be regarded as the sole one upon the subject. It is further said, in that case, that "natural legitimation respecteth actual obedience to the sovereign at the time of the birth," (e) but this is still also referring to the same standard. It is here to be remarked, that the result in *Calvin's* case was, to discriminate between a *Scotti antenatus* and *post natus*, in respect of a legitimation in *England*; the time of the birth was, therefore, a very material ingredient of the principal question, and may be regarded as the turning point on which that question depended: it is no wonder, therefore, that, in a very long report, and one containing an abundance of extrajudicial matter, the same idea may be exhibited perhaps in different points of view, and be sometimes so indistinctly expressed, as to cause some embarrassment.

In the same case it is adjudged, "that the usual and right pleading of an alien born doth truly and lively express and describe what he is, and that this pleading is both exclusive and inclusive, viz. *extra ligentiam domini regis, et infra ligentiam alterius regis*." (f) I can find no principle of the common law which will exempt a person against whom the above plea will truly apply, from being considered as an alien born; I say of the common law, because by the *English* statute of 99 Car. II. c. 6. an exception is made to this rule in a particular case, (g) and perhaps there may be other statutory exceptions. I hold it, therefore, to be a universal proposition, that, by the principles of the *English* law, no man can sustain a real action, unless he either shews that this plea is not true with regard to him; or that, being true, he forms an exception to it, by virtue of some statutory provision, or by having, subsequently, to his birth and before the accruing of the action, become legitimated in the country where the action is instituted; or, unless his title to the land is preserved to him by treaty or otherwise, and the right of suing is preserved by necessary consequence.

Some supposed exceptions have been confidently stated from the *English* books, but I flatter myself I shall be able to shew that they all fall strictly within my position. I will now proceed to examine them.

And, first, great stress has been placed, on behalf of the plaintiffs, on a resolution in *Calvin's* case. (h) The resolution is as follow, viz. "And, as to the fourth, it is less than a dream of a shadow, or a shadow of a dream; for, as it hath been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth; for as the *antenati* remain aliens as to the crown of *England*, because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent cannot make him a subject to that crown to which he was an alien at the time of his birth; so albeit the kingdoms (which Almighty God divert, &c.) should by descent be divided and governed by several kings, yet it was resolved that all those who were born under one natural obedience while the realms were united under one sovereign, should remain natural born subjects and no aliens; for that naturalization due and vested by birthright cannot by any separation of the crowns be afterwards taken away, nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such matter *ex post facto*; and in that case, upon such an accident, our *postnatus* may be *ad fidem utriusque regis*, as *Bracton* saith in the before remembered place. *Rol. 477—sicut.*" &c.

(a) 7 Rep. 25.

a.  
(b) *Ibid.* 6.

(c) 7 Rep. 16.  
a.

(d) *Ibid.* 18.  
6.

(e) 7 Rep. 27.  
a.

(f) 7 Rep. 16.  
b.

(g) 1 Bl. 372.

(h) 7 Rep. 27.  
a.

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An objection had been made in that case by the defendant, "that if *postnati* were legitimated in *England*, what inconvenience and confusion would follow, if the royal issue should fail, whereby the kingdoms might again be divided." (a) The Judges, taking up this supposed case, gave the answer to it which is above quoted. The objection having reference to a supposed inconvenience in *England*, the answer to it must be considered under the same restriction. The judges are here of opinion that, in case of a dismemberment of the two kingdoms, and being governed by several kings, the *postnatus* would still remain legitimated in *England*. This supposed case, however, differs from the case before us in the following particulars; 1st. The *Scotch postnatus*, in that case, was born under the allegiance of the King of *England*; 2dly. This allegiance, being, by the *English* decisions, perpetual, continues, (as the king of *England* continues,) notwithstanding the *postnatus* may have fallen under a different power; 3dly. And consequently, he may truly be said to be, in the language of the case, *ad fidem*, with respect to the King of *England*; and, 4thly. The general plea before stated will not exclude this *postnatus*; for it cannot be said of him that he was born without the allegiance of the King of *England*. But, in the case before us, 1st. The plaintiffs were not born under the allegiance of this Commonwealth, nor had contracted such allegiance at the time of the descent in question; 2dly. There was, consequently, no existing allegiance due from them to it, even on the *English* principles; nor could they be truly said to be *ad fidem* with respect to it; and, 3dly. The general plea before stated would truly have applied to them, in both its members.

(a) ? Rep. 26.  
a.

The above resolution it is also contended will go to sustain a claim, *e converso*, viz. by an *English postnatus* in *Scotland*, supposing the same common law to exist there, after the supposed dismemberment; and this view of the case, it is argued, has a strong analogy to the case before us. I have already said that this resolution should be considered with reference to *England* only: in relation to a discussion in *Scotland*, it was no case before the Court; it was wholly extrajudicial: but upon principle, I cannot see a difference. The *English postnatus* was as much born under the allegiance of the King of *Scotland*, as the *Scotchman* was under that of the King of *England*. The kingdom of *Scotland* was (before the act of union) wholly independent of that of *England*, and James's character of King of *Scotland* was not merged in that of King of *England*; after the supposed separation, a King of *Scotland* would still exist: there would be a continuation of the same government, and the allegiance due to the King of *Scotland* at the time of the birth, (before the separation,) would continue to that king after that event. It might truly be said of the *English postnatus*, suing in *Scotland*, that he was born under the allegiance of the King of *Scotland*, and was *ad fidem* with respect to him; and the general plea before stated would not truly apply to him. The effect of this supposed dismemberment, therefore, would not be to destroy the tie of allegiance, by destroying the correlative of the subject, by establishing a different government on the ruins of that government to which the allegiance was due; but to transfer and continue to the persons of two kings that allegiance which before was due to one. I shall presently attempt to shew that, under the doctrines of those times, (as derived from a feudal origin,) it was no novelty for a subject to owe allegiance to two or more sovereigns. In this supposed case, therefore, *quacunque via*, there would be, according to the *English* decisions, an existing allegiance due to the king, in either country, which would capacitate the plaintiff to sustain the action.

The supposed case of a dismemberment, therefore, (entirely extrajudicial and hypothetical as it is,) only proceeds upon the idea of a *separation of the crowns*, of a descent to several kings: it does not put the case of a destruction of the kingly government. It goes upon the idea of a continuation of the same government, though under different kings, and a consequent continuation of the original allegiance: it is entirely different, therefore, from the case of the destruction of the tie of allegiance, by the erection of a new and different government upon the ruins of the old. Every position to be found in the *English* cases of this war proceeds, at most, upon the former idea. The right of revolution, and erecting a new government, was not an admitted doctrine of the day; it was incompatible with the *jure divino* ideas which then prevailed. May we not, then, say with confidence, that the case now before us, had never entered the minds of the *English* Judges? And that their decision, even where general, shall not be applied to a case, in which the grounds and reasons of their actual decision fail us, and which those judges most certainly never contemplated?

These same ideas must be borne in mind, while we examine a quotation from *Bracton*, 427. which is also much relied on, on the part of the plaintiffs. That quotation says, "there are some *Frenchmen* in *France ad fidem utriusque regis*, and always were so both before and since the loss of *Normandy*, and who plead here and there because *ad fidem utriusque regis*." (b)

(b) ? Cu. 27.  
b.

The *Frenchmen* here alluded to were *Normans*, born under the allegiance of the King of *England*, whilst he had possession of *Normandy*. It is here to be remarked, that the loss of *Normandy* which *Bracton* speaks of, happened in the reign of King John, and in the year 1205, (c) and that *Bracton* wrote in the reign of Henry 55.

(c) ? Hume.

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Read.

(a) 7 Co. 20.  
b.

(b) 1 Bl.  
Comm. 367.

(c) 7 Co. 22. b.

(d) 1 Hale's P.  
C. 66.

(e) 1 Tucker's  
Bl. part 2d,  
p. 370.

III. (a) which reign began in the year 1216: so that this quotation evidently means those *Normans* born whilst *Normandy* was subject to *England*, very many of whom may be reasonably supposed to have been yet alive when *Bracton* wrote. Because they were born under the allegiance of the King of *England* they remained legitimated in *England*, by the *English* doctrines, even after the loss of *Normandy*, and were still considered as *ad fidei* with respect to the King of *England*: but they were also born under the allegiance of the King of *France*. *Normandy* was a fief holden under him: the King of *England* was, in respect of it, a vassal, and the King of *France*, his liege lord; and there are many instances to be found in the history of both nations, of the Kings of *England* doing homage to the French king, in respect to their possessions holden upon the continent. By the feudal law, "allegiance, properly speaking, is due to the lord paramount or sovereign." (b) Under this idea, therefore, those *Normans* owed allegiance emphatically to the French king; and in consequence of this allegiance it was, that they were, by the principles of the common law, permitted to sue in *France*. In illustration of this position we find it resolved in *Calvin's* case, "that those who were born in *Wales*, before 12 Ed. 1. whilst it was a distinct kingdom, were natural born subjects, (as to *England*,) because holden of *England*, or within the fee of the King of *England*." (c) These *Welshmen*, therefore, might as well as the *Normans*, sue in both countries; and for the same reason, viz. because, and only because, they owed allegiance to both sovereigns.

Whilst I am upon this subject of allegiance, I will beg to refer to 1 *Hale's Pleas of the crown* 58. *et seq.* who fully and elaborately proves, that there might be, and really were, in many instances, several allegiances due from a subject to several sovereigns. Thus, in p. 66. he tells us, that when *Hen. II.* made his eldest son King of *England*, in his life-time, so that there was *rex pater* and *rex filius*, and when *William* King of *Scotland* had, at the same time, done homage to *Henry* the son, for his kingdom, saving the faith due to *Henry* the father, these several kings, though subordinate in respect of each other, were sovereign in respect of their subjects; and the subjects of *Scotland* owed an allegiance to their king, saving their faith to the Kings of *England*, father and son, and an allegiance to *Henry* the son, saving their faith due to *Henry* the father. (d) It follows that these *Normans*, referred to by *Bracton*, owed at their birth an allegiance to both kings, (viz. of *England* and *France*,) and this allegiance continuing during their lives, upon the principles of the *English* law, they could always be said to be, in the language of the case, *ad fidei utriusque regis*. *Blackstone*, in confirmation of this position of owing several allegiances, admits that a natural subject of one prince may, even by his own act, subject himself to another, though he may thereby bring himself into straits and difficulties. (e) Without inquiring into those difficulties, or differing the case of two several allegiances produced by the act of the party himself, this quotation is decisive to shew that, under the *English* doctrines, a natural born subject may owe allegiance to more sovereigns than one, even since the destruction of the feudal system.

Am I not correct, therefore, in accounting for all these supposed exceptions, by shewing that, in every instance, there was an existing allegiance due from the party suing, to the respective sovereigns?

I have said, and I repeat, that no position by any of the *English* Judges was predicated upon the idea of the erection of a new and different government. If there be any such, let it be produced. Are we not then to consider ours as a new case, not contemplated, nor provided for, by the *English* decisions? The reign of *James I.* was not an era when the Judges were independent enough to have dared, or would have been permitted (f) to argue upon the supposition of a destruction of the kingly government. That loyal and devout spirit which caused the Judges in *Calvin's* case, (27. a.) so much to deprecate a descent of the kingdom to several kings, that slavish devotion of the Judges to the will of King *James*, which, in relation even to this very case of *Calvin*, *Hume* remarks with censure, in more passages than one of his history, (g) while it goes far to destroy the authority of the decision, would not have permitted them, for a moment, to contemplate the idea of the erection of a popular government upon the ruins of a throne, deemed, in the *mania* of the times, to have been held by divine authority.

In the total absence, therefore, of a case of this kind, either actual or contemplated, in the *English* authorities, we must reason only from analogy.

It is held in *Corp. Rep.* p. 208. "1st. That a country conquered by the *British* arms becomes a dominion of the king in right of his crown," &c. and, 2dly. "That the conquered inhabitants once received under the king's protection become subjects, and are universally to be considered in that light, and not as enemies or aliens;" and in 1 *Bl. Com.* 103. the reason of this privilege is given; it is, "that in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and conquered, that, if they will acknowledge the victor for their master, he will treat them in future as subjects, and not as enemies." Now nothing

(f) See 11 Co.  
Rep. *passim*,  
to prove this.

(g) See *Hume's*  
*Hist.* vol. 5.  
p. 554. and  
vol. 6. p. 169.  
See also in 4  
*Cranch*, 210.  
other authorities  
cited to shake the de-  
cision in *Cal-  
vin's* case.

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can be clearer than that, if the whole territory of the belligerent nation is not conquered, the inhabitants of the unconquered part continue to be, in respect of the sovereign of the part conquered, enemies and aliens; enemies during the war, and aliens after the peace. They do not become subjects of the conquering power and are not to be considered in that light; because they have not submitted to the conqueror, nor by any compact entitled themselves to the privileges of subjects; and yet they were once inheritable in the territory conquered, and can say as much as the present plaintiffs can say in respect of the territory of *Virginia*, viz. that, at the time of their birth, they were legitimated here. The people themselves who are conquered are legitimated by virtue of the implied compact only, and cannot claim such legitimation by the paramount title of having been, at the time of their birth, inheritable in that territory under another sovereign. If, then, the territory of *Virginia* had been conquered from *Great Britain*, in the ordinary way, by an existing sovereign, there is no doubt but that, upon the foregoing principles of the common law, the residuary subjects of the *British* empire, not residing here, nor contracting an allegiance to the conquering power, would have remained aliens, as to the sovereignty established here by such conquest. I confess I cannot see a difference between that case and ours: I see no difference in this respect between a change of the sovereignty of *Virginia* effected by an existing sovereign, and by a sovereign merely coeval with the change: and I should be sorry to be obliged to admit, that a people forming a government by compact, have not as ample power, both to confer rights upon the members of such compact, and to exclude the rest of the world from a participation of them, as a conqueror dictating at the point of the sword; nor can I agree that the natural (though silent) operation of a compact government is less efficacious, in either respect, than that which, as to these particulars, is produced by a conquest.

I conclude, therefore, that, according to the acknowledged doctrines of the *English* common law, all the beforementioned supposed exceptions are referrible to a principle which does not exist in our case; I mean that of a continuing and existing allegiance; that the case before us, of the creation of a different government, and the destruction of the ancient tie of allegiance, had never entered the minds of the *English* Judges, when they were so copiously, and so extrajudicially, (in *Calvin's* case,) dealing out their doctrines on this subject; that if it had, they could not have sustained the pretensions now set up by the plaintiffs in the present instance, without revolting against, and overthrowing, their own admitted principles; and that as far as we can judge by analogy, the principles of the *English* law authorize us to say that, in the actual case before us, an *English* court, itself, would render judgment in favour of the defendant.

This view of the subject supersedes the necessity of saying much on the second branch of my inquiry; namely, how far the *English* doctrines on this subject are controlled by the principles of the revolution, and the provisions of our constitutional and legislative acts. If the actual principles of the *English* law will suffice for the defendant in the case before us, that defendant holds a much stronger ground in this country, and in this Court, which must reject such of those principles as are heterogeneous to our republican institutions. All the *English* decisions upon this subject are bottomed upon three main principles, neither of which can be admitted in the case before us. They are, 1st. That allegiance is perpetual, and cannot be renounced by the subject; 2dly. A supposition of the continuation of the same sovereignty to which this perpetual allegiance was originally due; and, 3dly. The character of that allegiance, by the *English* law, is, that it is due to the *person* of the sovereign, and not to his political character. (a) As to the last position, we have, happily, no king, to whose sacred *person* this allegiance may be said to be due. It is the government only, which affords protection to the citizen, and to this government only, which is perpetually changing, as to the *persons* who administer it, though itself is permanent, the allegiance of the citizen is due. As to the second position, I need not repeat that the *American* people have erected a different as well as a new government. The first position requires more consideration.

The decisions by the *English* Courts at remote and arbitrary periods, and the municipal treaties of that country bottomed thereon, have denied the existence of a great natural right; I mean the right of expatriation. It is the character of the common law that it draws from various sources, is compounded of parts of various laws and codes, and refers to various arts and sciences. It is also a maxim of that law that "*cuiuslibet in sua arte credendum est*;" and Lord Coke tells us, somewhere, that it is better "*potere fontes quam sectari rivulos*." Shall we not, under the sound sense of these maxims, correct the mistakes of a municipal code, touching a question of general law, by referring to the fountain from which itself has drawn? Shall we decide a question of natural right, and of general law, by referring to the most approved writers, and to the sense of the world, on that subject, or be governed by the particular municipal codes of a particular country? I believe, sir, that this position of the *English* judges has always stood condemned by the most enlightened writers upon natural law. I mean not (as being unnecessary in the present

(a) 1 *Tuck. Bl.* part 2d, p. 371.

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(a) See also  
*Vattel*, 170. §  
220. 172. §  
223.

(b) See *Acts*  
of Oct. 1783,  
a. 16.

(c) 2 *Tuck.*  
*Bl. App.* p.  
62.

(d) 7 *Co.* 601.

case) to investigate this point at this time; but I beg leave to refer to the new edition of *Blackstone*, (vol. 1. part 2. note K. p. 90.) where the editor has elaborately discussed the subject, and his conclusions seem fully to sustain my position. (a) I rather choose to refer to the sublime principles contained in the declaration of independence, and in the *Virginia* bill of rights, consecrating the right of expatriation; to the memorable assertion of that right by the *American* people, who, sword in hand, expatriated themselves from the government which tyrannized over them; to the limited and qualified adoption of the common law, as a part of our code; and to that dignified act of the *Virginia* legislature which prescribed the mode of effecting an expatriation, but did not presume to bestow the right. (b)

While these great authorities destroy some of the main pillars on which the *English* doctrines on this subject are founded, the *Virginia* legislature by several acts have declared who shall be deemed citizens, and who aliens. Under those acts, the plaintiffs, at the time of bringing the action in question, must have fallen into the latter class. It has been supposed by some that, inasmuch as the act of *May*, 1779, c. 55. after declaring who shall be deemed citizens, declares that all others shall be deemed aliens, and as in a subsequent act (*October*, 1783, c. 16.) on the same subject, this latter declaration is omitted, that the last law is to receive a more enlarged construction in relation to aliens than the former. (c) These answers occur to me, however, to this position. 1st. As every man, according to the *English* doctrines, is either "an alien born or a subject born," (d) and, according to those doctrines, as here received, is either an alien or a citizen, it was perhaps a work of supererogation after declaring who, and who only, should be deemed citizens, to declare, also, who should be deemed aliens; and, 2dly. That position proves too much, for it would equally legitimate the subjects of all other countries in the world, as of *England*, whereas the same authority seems to think that the omission was produced by the intermediate conclusion of the treaty of peace between *America* and *England*. To say nothing of the absurdity of the legislature's doing away, in the gross, the disabilities of alienage, when, at the same time, it was granting in detail, the rights of citizenship, it is contrary to all fair deduction to infer a conclusion, which is very general and extensive, from a cause which is limited and particular.

Such is the construction which I deem myself obliged to adopt in the present instance. If the adherence of the *British* subjects to their own government, on the erection of our government in 1776, has thrown them into the class of aliens by election, a definition I think properly applied to them in the new edition of *Blackstone*, (see vol. 1. part 2. *App.* p. 102.) they stand on as good a footing as our own expatriated citizens. Subjects of foreign nations have no reason to complain at receiving the same measure as is dealt out to our own citizens, unless they have superior rights secured by treaty. Such a treaty would not be natural nor reasonable; but if such a one exists, it must probably have its effect. Whether there be any such treaty rights in the present instance, we shall presently inquire. These *British* subjects have, however, less pretensions to sue than our own expatriated citizens; for the latter can say (which the former cannot) that they were once under the allegiance of the Commonwealth of *Virginia*; say, in some instances, that they were born under the allegiance of this Commonwealth. Why then shall we not consider these *British* subjects as expatriated, in respect of the Commonwealth of *Virginia*? expatriated, by having refused to yield to us their allegiance, and to unite their destiny with ours.

I have thus chosen to consider the pretensions of the *alienati*, or in other words the common law doctrines of legitimation, somewhat at large; because those doctrines have been often pressed upon this court, particularly in the cases of *Fairfax v. The Commonwealth*, and have received countenance from the opinion just delivered. In all the elaborate discussions which have taken place in this Court upon this subject, there has been heretofore no difference of opinion upon this point, as far as I have understood the Judges: and our late venerable President† (who did not sit in those causes) has informed me, since they were determined, that he entirely agreed in opinion with the Court upon this subject.‡ But for the foregoing considerations, I might perhaps have saved myself this trouble, for it appears that both the treaty of peace and the treaty of 1794 have repudiated the pretensions of the *alienati*. (e) The latter treaty does not immediately apply to this case, being posterior to the judgment in question, and would not now be mentioned, but as corroborating and explaining the former. That treaty abandons those pretensions by set-

(e) See note  
to p. 1. of this  
opinion.

\* By Judge TUCKER.

† Judge PENDLETON.

‡ Since this opinion was delivered, this question has been decided in entire conformity thereto, by the Supreme Court of the *United States*, in the case of *Dawson's Lessee v. Godfrey*, 4 *Cranch*, 321. It was so decided by the unanimous judgment of the Court, contained in a very able and luminous opinion delivered by Judge JOHNSON.

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ing up a new criterion, viz. the actual holding of the property at the epoch of its date. In setting up this epoch, and establishing a new criterion in relation to *British* subjects, that treaty goes beyond the common law idea of *antenati*, which calls merely for the period of our separation from *Britain*; and by superadding the other requisite, (an actual holding at its date,) it also abridges the pretensions of such *antenati*, for all the residue of their lives, subsequent to the signature thereof. In thus enlarging and abridging the common law pretensions of the *antenati*, am I not correct in saying that the treaty of 1794 has set up an entirely new rule, and has abandoned those pretensions altogether? So, with respect to the treaty of peace, the case is precisely the same, if that treaty be considered as relating at all to the laws of alienage of the several states, and the epoch of its signature be resorted to as protecting from the operation of those laws rights accruing before that time: and this, perhaps, is the most that can be contended for. Whether this construction thereof be correct will presently be considered. At present I will remark that it is entirely incompatible with the before mentioned common law rights of *antenati* which are commensurate with the duration of their lives. Am I not, therefore, correct in saying that both these treaties have abandoned the pretensions of the *antenati*, and taken a new ground (whatever it may be) in favour of *British* subjects? If that ground of claim exists, therefore, in the case before us, it is not upon the foundation of either of the said treaties.

We come next to consider, somewhat more at large, the application and effect of the treaty of peace, in arresting the operation of the laws of alienage of the several states.

Under this head, I will consider, for the sake of greater perspicuity, the rights of *British* subjects, in a fourfold point of view. 1st. In relation to land actually holden by such subjects in this country, at the epoch of our separation, or declaration of independence: a right of this sort not existing in the present case, this topic will be but slightly and incidentally touched;

2dly. In relation to lands purchased by such subjects in this country, since the epoch last mentioned, and which, if they be aliens, enure to the Commonwealth by way of "forfeiture;"

3dly. In relation to such lands as since that epoch have descended to such subjects, and which, if they be aliens, enure by way of "escheat." Every thing said on those two points will apply, *a fortiori*, to the case now before us, being that of a descent cast, since the date of the treaty;

And, 4thly. In relation to the capacity of such subjects to sue for lands so holden, purchased, or descending, as the case may be.

In laying down these points, I must be permitted to cling, with equal pleasure and pertinacity, to the epoch of our declaration of independence, rather than that of the treaty of peace, as erecting us into an independent nation; as affording that precise point of time to which alone the treaty applies, (if it applies at all,) in arresting the laws of alienage of the several states: I must cling to this epoch, because the *United States*, on that day, for the many weighty reasons then declared, dissolved forever the connection antecedently existing between us and *Great Britain*; because, in the emphatical language of the *Virginia* constitution, the many acts of misrule theretofore committed, by the *British* king, had dissolved his government over us; because the whole fabric of the old government was, in truth, annihilated and destroyed by that king's withdrawing his protection from us, and our abjuring allegiance to him; and because the *British* nation itself has conceded this point, by admitting in the treaty of peace, (Art. 1.) that it "treats with the *United States* as free, sovereign and independent states," and not as revolted subjects; thereby clearly relating, in that treaty, to the era of the declaration of independence. Away then with that absurd and slavish doctrine which would derive every thing from the recognition and bounty of the *British* king; would postpone, for near eight years, our title to rank among the independent nations of the earth; and degrade for the same period, all our laws and resolutions, to the level of usurped and unauthorized acts. We date our independence from this era on grounds paramount to any thing in the power of that king to grant or to do: we treated with him for peace, but not for independence: we asked him to put an end to the war, but not to sanction a government already established upon the only just basis, the consent of the governed.\*

\* Since this opinion was delivered it has been decided by the Supreme Court of the *United States*, in the case of *McIlwain v. Cox*, 4 *Cranch*, 311. that the "treaty of peace contains a recognition of our independence, not a grant of it," that the laws of the several states were, after the 4th of July, 1776, the acts of sovereign states; and that this was not derived from the concessions of the *British* king. This



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I would construe the general words of the treaty to relate to this epoch, not only for the abovementioned reasons, but because, in truth, that great event, in connection with the laws of alienage of the several states, drew a prominent line of distinction, in relation to lands acquired in this country by *British* subjects. While it exhibits all lands previously acquired, and then holden in this country, as being lawfully acquired, under the faith of existing laws, and entitled to the attention of the contracting parties, it throws into the class of nullities, and illegal and unauthorized acts, all posterior acquisitions of lands by *British* subjects. Powerful reasons existed, therefore, on this ground, for embracing the epoch of our independence, rather than that of the treaty, in applying that instrument to the arrestation of the laws of alienage of the several states, admitting, for the present, that it at all relates to such laws. On the part of the *United States* the great considerations just stated, (to say nothing of others which will be presently noticed,) must have had great weight; and the *British* king might, on his part, while he admitted himself bound to treat for a guaranty of lands fairly acquired by his subjects in this country before that epoch, have justly considered himself absolved from any obligation to create, or at least enlarge titles in favour of his subjects; to support and extend that solidity of an interest acquired here, by them, after the *commune vinculum* was broken.

In contemplating the effect of the treaty of peace upon the case before us, I will first consider, as being a stronger case for the plaintiffs, than that of a right accruing by "escheat," the right of the Commonwealth, by way of "forfeiture," to lands purchased by *British* subjects, since the era of our independence.

The words of the treaty, which are supposed to have an effect on the present question, are, that "there shall be no future confiscations made." (Art 6.) What is the import and extent of the term "confiscations" here used?

The right of the Commonwealth to lands purchased by an alien, is an ordinary right derived from the common law. It exists at all times. It is independent of, and does not arise out of a state of war. In the present case it resulted to the Commonwealth from the establishment of a new government here, and the non-accession of the plaintiffs to that government, prior to the commencement of their claim. Although in fact, the plaintiffs were enemies to their country, from the commencement of our hostilities with *Britain*, they were not, legally speaking, aliens, until the erection of our new government. Anterior to that event, the right now in question could not have resulted to the Commonwealth. So, on the other hand, if the erection of our new government had preceded or been unaccompanied by a state of war, the right in question would have resulted, as well prior as subsequent, to the existence of hostilities. Therefore it is that I say this right does not arise out of a state of war: it results from a mere municipal regulation. It accrues not because the person purchasing is an enemy, but because he is an alien. It is not a right pointed against the subjects of a particular power with whom we may chance to be at war, but against the subjects of all foreign nations whatsoever. This right is, by the common lawyers, technically denominated a "forfeiture." "Forfeitures of lands and goods for offences," (and this right is founded on the offence of an alien in presuming to purchase lands contrary to law,) (a) says Sir William Blackstone, "are called by the *Civilians bona confiscata*, because they belonged to the *Fiscus* or imperial treasury, or, as our common lawyers term them, *bona foris facta*." (b) Indeed, Lord Coke seems, in one passage, to consider "confiscation" and "forfeiture" as synonymous terms; (c) and the author of the *Commentaries* appears also, in a few passages of his work, to have used the term "confiscation" as descriptive of a forfeiture into the treasury; but keeping in view the dis-

doctrine had before been agreed to even by the *English* courts themselves, as may be seen in *H. Black. Rep.* 149. *Wright v. Nutt*, and *ibid.* 135. *Follott v. Ogden*, by Lord Loughborough; and Judge CHASE had, in his very able opinion in the case of *Ware v. Hylton*, (3 *Dallas*, 255.) laid it down as an established doctrine "that the independence of the *United States* commenced with the declaration of congress of July 4th, 1776; that no other period could be fixed for the commencement of it; and that all laws passed by the legislatures of the several states after that epoch were the laws of sovereign and independent governments."

"I might here observe that in 4 *Bro. Parl. Cas.* and *Parker's Rep.* p. 163. it is said to have been holden by the house of lords that the disability of an alien to purchase lands was not a penalty or forfeiture, but arose from the policy of the laws and on this ground a demurrer to a bill, praying a discovery in this particular, was overruled; to which I will add that, if it is not considered as a penalty or forfeiture under the construction of the *English* laws, much less can it be considered in the stronger light of a confiscation *jure belli*. In giving my opinion, however, I will admit the most, that it is a forfeiture under the provisions of the common law.

- (a) 1 *Bl. Com.* 372.  
(b) 1 *Bl.* 299.  
(c) 3 *Inat.* 227.

question, when this elegant and accurate writer has taken, between the terms so above stated; (the one being a civil law, and the other a common law term;) and finding that he has expressly treated of the right now in question in a chapter headed "title by forfeiture," (a) I must conclude that the technical and appropriate term, descriptive of this right, is forfeiture, and not confiscation. At least, it must be granted, and that is sufficient for my purpose, that the former is a much more usual and proper term than the latter, to designate the right in question. I derive it as a very respectable authority in favour of this opinion, that the constitution of *Virginia*, in transferring this, among other rights, from the king to the Commonwealth, uses the terms "escheats, penalties and forfeitures," (b) without making any mention of "confiscations."

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(a) 3 Bl. Com.  
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(b) Art. 20.

I admit that, where the term "confiscation" shall occur in a treatise or instrument relating only to the common law, it shall there, from obvious necessity, be taken as synonymous with "forfeiture;" and, indeed, in any other treatise or instrument, where the term may not otherwise be satisfied, or where it appears evident it was intended to have that extensive signification. But on the other hand, in instruments which concern the civil law, or the *jus belli*, it is reasonable to tie up the meaning of the term confiscation to forfeitures of that kind; or rather to understand the word in its proper and legitimate signification; it would be unnatural and unnecessary, in that case, to extend it so as to comprehend forfeitures arising only from the common law.

Besides this ordinary and municipal right of forfeiture, there is, as I have before said, an extraordinary one accruing to belligerent nations, of confiscating the property of their enemies. This right does not await and attend on the contingent event of a purchase by, or descent to, an alien; it effects property then actually hidden by the enemy; it is not carried into effect by the ordinary course of the municipal laws; the property is seized and confiscated by an extraordinary act of the government of the belligerent nation. It is seized, not because it is the property of an alien, but of an enemy. This right is technically and properly denominated a right of confiscation; I know of no other term which will properly designate it.

Here, then, are two senses, in which the term "confiscation" may be used. The one, (to omit its civil law signification,) a restricted sense, going merely to a seizure by a belligerent nation in right of war; the other an extensive sense, meaning not only what is just mentioned, but, further, a mode of acquiring property by the Commonwealth under a permanent municipal regulation: a sense extensive enough, not only to repeal the general laws of alienage of this Commonwealth, in cases like the present, but also, (if not restrained by other considerations,) to remit perhaps, all forfeitures whatsoever incurred, in this country, by *British* subjects or refugees, by crimes or otherwise! Let us inquire in which sense this term was intended to be used in the article in question.

This article is contained in a treaty of peace. "A treaty of peace," says *Fattel*, "naturally and of itself relates only to the war which it puts an end to, and therefore it is only in such relation that it is to be understood." (c) Such a treaty, therefore, does not naturally relate to a mere municipal forfeiture or regulation, no way dependent on, or produced by a war. This construction is much strengthened, in the present case, by the consideration that the *American* government, which formed the treaty in question, was much limited in its powers by the articles of confederation. That compact had emphatically reserved to the several states "their sovereignty, freedom and independence, and every power, jurisdiction and right not thereby expressly delegated to the *United States* in congress assembled." (Art. 2.) Such stipulations in treaties, therefore, and such only as were warranted by the express grant of power to the *United States*, were binding on the several states when opposed by their laws. This construction of that compact is admitted by the circular letter of congress of April 13th, 1787, (d) requesting the several states to repeal all acts contrary to the treaty of peace; it is asserted by the legislature of *Virginia* in their two acts of 27th June, 1784, and 12th December, 1787, which have only made such repeal in relation to *British* debts, on the conditions therein contained; it is expressly maintained and acted upon by our commissioners who negoti-

(c) *Fattel*, p.  
34.

(d) See it  
quoted in *Jef-*  
*erson's* letter  
to *Hammond*,  
p. 48. § 38.

"In the same opinion of Judge CHASE, (mentioned in the note before the last,) these sentiments are contained: "I entertain this general idea that the several States retained all their internal sovereignty, and that congress properly possessed the great rights of external sovereignty. That congress did not possess all the powers of war is evident from this consideration alone, that she never attempted to lay any tax on the people of the *United States*, but relied on the several state legislatures to impose taxes, &c. and that after the confederacy was completed, the power of congress rested on the authorities of the state legislatures, and the implied reliance of the people, and was a government over governments."

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(a) See documents 7, 8, 9, 10 and 11. p. 70. attached to Jefferson's letter aforesaid.

ted that treaty, (a) and is admitted by the *British* commissioners, who acceded to a recommendation only, in relation to the restitution of the confiscated estates. (See art. 5.) In short, the limited government of the confederation was principally a government of requisition. In some cases a recommendation, or request to the several states, to repeal their conflicting laws, is expressly contained in the treaties themselves. In other cases, such request is inferable from the insertion in treaties of such stipulations as congress deemed necessary for the public good, but which yet required the sanction of the state legislatures. The 5th article of the treaty in question, just noticed, furnishes an instance of the former kind; and instances of the latter are to be seen in several of our foreign treaties which expressly waive the disabilities of alienage, in favour of the subjects of certain friendly powers.

The documents just referred to entirely shew that the *American* commissioners who negotiated the treaty in question strenuously disclaimed a power in congress to "interfere in matters appertaining to the internal polity of the several states;" and even declared that their power did not extend to stipulate for a restitution of confiscated estates, because those confiscations had been made under the authority of the several states; and hence a mere recommendation was proposed by them, and acceded to by the *British* commissioners. Congress did possess the power, and did exercise it, to prohibit confiscations (*i. e. jure belli* confiscations) in future: but they disclaimed the power to restore such property as confiscations, even of this class, had brought into the treasuries of the several states. This last case is much stronger than the one before us. As congress had the power of peace and war, it might well have been argued that a right arising only out of the war appertained to them, rather than to the several states, and that their power would reach even the case of a restitution; yet the several states having actually exercised this right, by seizures and sales, congress disclaimed the power to interfere otherwise than by recommendation. But the right of escheat and forfeiture now in question could on no construction appertain to congress; it strictly "appertained to the internal polity of the several states," and was, emphatically, beyond the power of congress. Congress had a right, by treaty, to convert enemies into friends, and to release the disabilities attached to the former character; but they had no power to invade the ordinary rights of the several states, and to invest with the privileges of citizens of *Virginia*, those whom the policy of her laws had thrown into the class of aliens. If congress, by the confederation, could not draw a shilling of money from the several states, but by requisition, it would seem to follow, that the assent of the states was equally necessary to pass their right to property, which needed only the formality of an inquisition and sale to bring it into their treasuries. If congress, by the 8th article of the confederation, were bound to defray "all charges of war and other expenses to be incurred for the common defence and general welfare, out of a common treasury, to be supplied equally," (by a given rule,) "by all the states," shall we make a construction, in the case before us, which would throw the price of peace, in the present instance, on some of the states, in case of others? upon the states' keeping up the laws of alienage, as incidental sources of revenue, in favour of such states wherein no such laws existed?

If by the 9th article of the compact aforesaid, the powers expressly specified, and delegated to congress, are only those of peace and war, and other powers of an external nature, relating chiefly to our intercourse with foreign nations, shall we adopt a construction in the present instance, which will depart from the general character of those powers, and invade a right of the several states, entirely of an internal and municipal nature?

But, independently of these considerations, I have supposed the word "seizure" to be a more proper term than "confiscation," to extinguish the right now claimed. The *English* law and ours are precisely the same on this subject; nay, I have even taken my ideas upon the subject entirely from the *English* authorities. As the *English* commissioners are not to be supposed ignorant of the real powers of our government, neither can they plead ignorance in relation to their own laws or technical terms, in forming the treaty. If the right now in question had been intended to be extinguished, would not the most appropriate terms have been used, especially in an instrument which, of itself, does not naturally reach that right? As these commissioners must have known, and were even warned, (as the aforesaid documents shew us,) of the incompetency of congress to affect the municipal polity of the several states, would they not at least have used the strongest and most unequivocal terms to effect that purpose, had it been contemplated or intended? Is it not an established principle of the law of nations, "that the state in which things are found at the moment of the treaty shall be considered as lawful; and, if it is meant to make any change in it, the treaty must expressly mention it; and that, consequently, all things about which the treaty is silent remain as they were found at its conclusion?" (b) and does not the sound sense of this rule equally extend to cases where terms are used, which, to say the least,

(b) *Vattel*, b. 4. s. 21.

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are equivocal, and may be otherwise amply satisfied? If in several of our treaties of amity and commerce with friendly *European* powers, the several states are called on, by the most particular and express stipulations, to waive their laws of alienage, in favour of the subjects of such powers, does it readily follow that in a treaty of peace with an enemy nation, an expression entirely congenial with the character of such treaty, and which can be otherwise abundantly satisfied, shall have this most important effect? Nay, even, if in the treaty of amity and commerce, formed by us with the same power, (*Great Britain*,) in 1794, some partial privileges on this subject could only be obtained for *British* subjects, and those conferred by the most explicit and unequivocal terms; if even these privileges, notwithstanding the lapse of eleven years since the date of the treaty of peace, created a general ferment in our country, arising from the recollection of ancient injuries; shall we construe the general words of the treaty before us, to have an equal or more extensive effect?

The term "confiscation," then, when occurring in a treaty of peace, and especially in such a treaty formed by the limited government of the confederation, naturally means, *ex vi termini*, a confiscation *jure belli*, and nothing further. If I am right in this idea, it was unnecessary, in the 6th article of the treaty before stated, to annex other and tautologous words, to make this more plain, to confine its signification to forfeitures, on account of the part taken in the war. Such was already its meaning, and additional words would have been entirely superfluous: and this is an answer to the objection arising from the annexation of such words to the prosecutions mentioned in the same article, of which more hereafter. I hold it also to be of great weight, in favour of my construction in this particular, that the confiscations here prohibited have this character more clearly designated, by being interdicted in the same article, and sentence of that article, with prosecutions on account of the part taken in the war.

If I am right in the above idea, as to the natural and general signification of the term "confiscation," when occurring in treaties of peace; that construction gains additional weight in relation to the treaty before us, by the further consideration that there were, in fact, many such confiscations made by the several state governments, during the revolutionary war. Perhaps I shall be warranted in saying that there were in fact such confiscations made by every state in the union. (a) Some of those confiscations were made by the very bills of rights or constitutions of the several states, but in general by legislative acts. Of the former class it may be seen that the 25th article of the bill of rights of *North Carolina* seems to confiscate the proprietary rights to lands within the limits of that state; the legislative acts were of various descriptions, as acts of attainder, of seizure and confiscation, &c., as may be seen at large in the documents attached to the letter just referred to. The *Virginia* act, upon this subject, after reciting that, by the declaration of independence, by the *United States*, the residuary subjects of the *British empire* became enemies and aliens to the said state, enacts, that all the property lying within the Commonwealth, belonging at that time to any *British* subject, &c. shall be deemed to be vested in the Commonwealth; and a subsequent clause describes who shall be deemed *British* subjects within the meaning of the act. (b) The passage of this act, *ipso facto*, confiscated the property therein contemplated; and the only inquiry necessary to be made, or which in fact was made, (c) under this act, as it respected the proprietor of the land, was whether he were a *British* subject, or not, within the meaning of the act; there was no inquiry whether he was, by law, an alien.

This act was emphatically an extraordinary act of confiscation. It was in addition to, and not in exclusion of, the ordinary municipal law of escheat and forfeiture, on account of alienage. It only reached *British* property then actually holden; whereas the general law extended also to lands afterwards acquired by *British* aliens. This act confiscated the property of all *British* subjects; whereas, the general law only reached the real property of those who were aliens. It may not universally hold, that all *British* subjects were then aliens, and if the ideas of the plaintiff's counsel were correct the general law would not reach lands acquired here by *British antenati*. These are prominent marks of distinction between the two laws; and this partial exercise of the extraordinary right of confiscation certainly did not supersede, or interfere with the general law, further than that act has expressly gone.

Some stress has been laid upon the act of *October*, 1784, c. 53. respecting future confiscations. It is not proper for me to avail myself of a knowledge acquired in another place, that it was decidedly the intention of the then legislature to avoid construing the treaty. There were various opinions then existing as to its true construction, and the prejudices and animosities of the day were not inconsiderable. Hence the act eventuated in using the very words of the treaty itself; and that merely by way of yielding the sanction of this state to that instrument as it really existed. That act meant not to take any new or extended ground what-

(a) See *Hammond's* letter to *Jefferson*.

(b) *October*, 1779, c. 14.

(c) See *Inquisitions* in the office of the general Court.

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soever; and the proviso, contained therein, inhibiting such confiscations posterior to the ratification of the treaty, can only extend to suits grounded on such confiscations as were intended by the treaty and the act to be prohibited.

Before I come to a particular examination of the 6th article of the treaty, I will take a short view of the 5th. The character of the confiscations interdicted by the 6th article will be elucidated by considering what kind of confiscations are contemplated in the 5th.

That article is in the following words:

"It is agreed that congress shall earnestly recommend it to the legislatures of the several states, to provide for the restitution of all estates, rights, and properties, which have been confiscated, belonging to real *British* subjects, and also of the estates, rights, and properties, of persons resident in districts in possession of his majesty's arms, and who have not borne arms against the said *United States*. And that persons of any other description shall have free liberty to go to any part or parts of the thirteen *United States*, and therein to remain twelve months unmolested, in their endeavours to obtain the restitution of such of their estates, rights, and properties, as may have been confiscated; and that congress shall also earnestly recommend to the several states a reconsideration and revision of all acts or laws regarding the premises so as to render the said laws or acts perfectly consistent not only with justice and equity, but with that spirit of conciliation which on the return of the blessings of peace should universally prevail. And that congress shall also earnestly recommend to the several states that the estates, rights and properties of such last-mentioned persons shall be restored to them, they refusing to any persons who may now be in possession of the bona fide price, (where any has been given,) which such persons may have paid on purchasing any of the said lands, rights or properties since the confiscation. And it is agreed that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

This article, upon a general view, relates only to legislative acts of confiscation. It relates materially to the refugees, who, not being aliens, were already safe from the operation of the laws of alienage. It relates, also, it is true, to confiscations made of the property of real *British* subjects; but as it purports to provide for the "restitution of their estates, rights, and properties," it cannot mean to extend to such purchases of lands by, or descents to, *British* aliens, posterior to our separation, nor to the common law proceedings adapted to such cases. In such cases such aliens have not any estate, right or property in such lands, nor would they be restored thereto; if the treaty arrests such proceedings, it would not restore, but create and enlarge the estates of such aliens. Cases of this kind, and the ordinary proceedings of forfeiture founded thereon, were not therefore contemplated in this article. With respect to the superior claims of those who held land here at the era of our separation, I am not prepared, at present, to say, whether the ordinary proceedings of escheat and forfeiture could ever have deviated them. Meaning to touch this topic slightly hereafter, I will only at present say that, if they could not, then, (as no necessity exists for it,) such proceedings shall not be construed to be comprehended in the confiscations mentioned in this article; nor will the case be otherwise, admitting the law to be different, if (as I believe) no forfeitures of this class had in fact taken place in *America* prior to the date of the treaty; and such, therefore, could not have been the ground of any stipulation in it. During the existence of the war, the ordinary law of escheat and forfeiture had not been put in force against *British* subjects. It had yielded to the more powerful and direct course of legislative confiscation, which was deemed preferable, and was universally pursued. I am authorized to assume this as an indubitable fact, because Mr. *Harrison*, (a) after ransacking all our laws and judicial decisions, from the beginning of the war to the time of his writing, has only stated one case (that of *Harrison's* representatives) in which a decision on this point has been given. That case will be set out presently from the documents attached to the before mentioned correspondence; from which it will appear that it was neither rendered by the Supreme Court of the State (*Maryland*) in which it was decided, nor rendered until the year 1790. When the devise in question in that case occurred is not stated. Am I not, therefore, correct in saying that no instances of the enforcement of the ordinary laws of alienage had taken place, in relation to *British* subjects, prior to the treaty of peace, and that, therefore, in providing for the restitution contemplated in the 5th article, it was wholly unnecessary to meet such cases? Courts, in making their constructions upon laws or treaties, may take notice of general and notorious facts, affecting such construction. The *English* Courts (for example) have in many instances taken notice of and acted upon the general delusion created by the South Sea bubble in that country in the beginning of the last century. (b) So, as in the present instance, the long and laborious researches of the *British* minister before noti-

(a) See his letter, p. 10. of the correspondence.

(b) See 1 P. Wms. 746.

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ed have produced no instance of the enforcement of the laws of allegiance against *British* subjects prior to the conclusion of the treaty, wherefore shall we give to that instrument a construction confronted by so many objections, and only (at most) necessary, if such decisions had actually existed?

It is also not unworthy of observation, that congress are called upon by this article, "to recommend to the several states a reconsideration and revision of all acts or laws regarding the premises," thereby meaning such special and particular statutes as may have been passed by the state legislatures on the subject: they are not enjoined to recommend an exemption in favour of *British* subjects from such disabilities, as accrued, not by virtue of particular legislative acts, but by the conjoined effect of the revolution, and the common law, relating to allegiance, antecedently existing in *America*.

If, then, the 5th article of the treaty relates to legislative confiscations only, let us next inquire whether the 6th article is to be understood in a more extensive point of view; bearing in mind the general principle, that the same word, occurring in different parts of an instrument, shall generally be understood in the same sense.

That article is as follows:

"That there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or she may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in *America* shall be immediately set at liberty/ and the prosecutions so commenced be discontinued."

This article, upon the whole context of it taken together, can only relate to those who, being *American* citizens, afterwards became refugees, and joined the enemy; it cannot relate (in a collective point of view) to real *British* subjects. Keeping out of view, for the present, that member of the article, which prohibits future confiscations, and which requires a more particular examination, would it not be absurd to stipulate that after peace had taken place between the two nations, we should commence no prosecutions against real *British* subjects for the part they had taken in the war? That part was not, in them, a culpable part; it was one which their duty and allegiance as subjects required them to take. Not residing in this country, nor being oppressed as the *Americans* were, it was not their business to join in our revolt, nor to take a part in our battles. If there had been no such article in the treaty, and *America* had thereafter commenced such prosecutions against such *British* subjects, *Great Britain* would have justly considered them as acts of hostility against her. This provision, then, as relative to real *British* subjects, is wholly superfluous, and unnecessary; it shall not, therefore, be construed to have relation to them. But, with respect to the *American* refugees, this stipulation was strictly necessary and proper. They had become citizens of the *American* states, and without expatriating themselves, had joined the standard of the enemy. After the peace, the several states might justly have called these their offending citizens to a severe account, for their conduct; but the humanity and honour of the *British* nation was deeply interested to protect them; to protect these *American* traitors from the vengeance of their own governments. The latter part of this article therefore applies exclusively to them; however it may be with the former. The interdiction of prosecutions for the part they had taken in the war, and of loss or damage accruing therefrom, as it related only to them, so it alone effectually secured them from such common law forfeitures as were incident to attainders or prosecutions for treason. As to confiscations, in relation to these persons as they were not legally aliens, in the several states, they were already sufficiently safe from the effects of the laws of allegiance. The inhibition then of legislative confiscations, conjoined with the interdiction of prosecutions on account of the part taken in the war, would entirely secure and protect the refugees. Wherefore then give the treaty a construction which entrenches upon the municipal rights of the states, when every necessary end, in respect of the refugees, can be attained, by understanding the term "confiscations" in its usual and ordinary sense?

With respect to real *British* subjects, it is equally absurd to apply to them the interdiction of the prosecutions, and tautologous to extend to them the confiscations prohibited in this article, even meaning thereby legislative confiscations. At the most, the article can be so understood, as to them, only through abundant caution. We will next inquire whether any necessity exists, in relation to them, (as it clearly does not in relation to the refugees,) to strain the term in question, beyond its usual and proper signification, and so far as to arrest the operation of the general laws of allegiance?

The policy of the *British* government may justly be considered as different in relation to lands held here by their subjects at the time of our separation, and those afterwards acquired. With respect to the former lands, they are safe in the hands

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of such holders, by the principles of the common law concerning escheat and forfeiture, literally understood. The principles of that law, as understood in *England*, not permitting a renunciation of the original allegiance, nor contemplating the event of the erection of a new and different government, the case now before us was never presented in *England*, nor provided for by their law. The only inquiry in that country had relation to the capacity of the person purchasing or claiming by descent, at the time of such purchase or descent respectively. The *British* holders of land in this country, at the era of our separation, having been therefore capable of obtaining and holding lands here at their respective times of acquisition, committed no offence against our laws, and are safe from the penalties of the laws of escheat and forfeiture, by the literal terms of the common law. It is a great question, but one respecting which I have formed no final and decided opinion, whether the common law should be moulded, in this country, on the great principle that citizens may become aliens, and of course incapable of acquiring lands, so as to reach this case also, of lands lawfully acquired, and only rendered unlawful to be holden (if at all) by matter *ex post facto*; or whether a respect for vested and existing rights, falling in with the liberal spirit of the modern law of nations on this subject, (a) should turn the scale in favour of a literal adherence to the *English* law, and thus protect lands actually holden here by *British* subjects, at the time of our separation.

(a) *Vattel*,  
p. 575. § 30n.  
p. 483. § 76.

If such should be esteemed the correct opinion, the lands of the then holders are already safe from the law of escheat and forfeiture; and the treaty therefore need not receive an extended construction in order to protect them: and as such lands are also protected from legislative confiscations, (or, in other words, acts of hostility,) by the mere conclusion of the peace, the stipulation in question need not be applied at all, to real *British* subjects, even in relation to lands by them holden in this country before the war.

But, however this may be, and whatever strong obligation there may be upon a sovereign to guaranty to his subjects lands held in the enemy's country at the time of the commencement of hostilities, and, however this circumstance might weigh in forming a construction of a treaty when such a case shall actually occur, the case is widely different in respect of future, eventual and possible acquisitions; future, I mean, in relation to the establishment of our new government, and the actual commencement of hostilities. Such is precisely the character of the case now before us; and what makes it still infinitely weaker is, that it accrued even long after the signature of the treaty of peace!! In the case of war, all civil intercourse, between the subjects of the different nations, becomes prohibited and unlawful. This was particularly the case in our revolutionary war; the statute of 16 Geo. III. on the part of *Britain*, and many similar acts on the part of the several states, having prohibited all, but a hostile, intercourse between the people of the belligerent nations. In such a state of things, therefore, there would be but few to purchase lands (in the ordinary sense of the term) in either country; and even in respect of devises and descents to *British* subjects, we cannot, without imputing a gross ignorance to our people, in relation to the laws of alienage, (an ignorance which could not, especially; be pretended, in this Commonwealth, after the strong legislative declarations on the subject contained in the before-mentioned act of 1779,) suppose that many instances took place of devises being made, or descents permitted, to those who, in the double character of enemies and aliens, were liable to the double penalties of legislative confiscations, and municipal forfeitures on account of alienage. The permission of such vain and fruitless devises and descents, would argue great negligence and weakness on the part of our people; and we may therefore fairly conclude that cases of this class, occurring during the war, were probably few; and those as I have already said, possessed no strong claim on the *British* king to stipulate in their favour. Besides, no construction can be made, in the present instance, in favour of heirs and devisees, which will not equally operate in favour of actual purchasers of land here, (in the ordinary sense,) who, with their eyes open, have violated the laws, and contravened the policy of their sovereign! If a plaintiff of this description were now before the Court, would the construction of the treaty be extended in his favour? Certainly not. But the construction must be uniform; and it is a sound rule that in making a construction, all the consequences are to be taken into consideration. I repeat, therefore, that the cases of any of these classes were probably but few; that none of them had any strong claim upon the *British* king to stipulate in their favour, and that the actors in some of them actually contravened his policy and injunctions. These cases were therefore probably not contemplated nor considered in forming the treaty, or if so contemplated, were abandoned on account of the weakness of their pretensions.

But further, *British* subjects so claiming on any of the three grounds of descent, devise, or actual purchase, held not actual interests, with reference to the epoch of our independence, but mere possibilities of interest, (even admitting the question of

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alienage to be in their favour,) interests emphatically *in studius*, interests often assailed by the acts of our legislature, and reprobated by the decisions of our courts. As well might the eldest sons of our citizens complain of the destruction of the right of primogeniture, living their fathers, as these *British* subjects object, that long antecedent to the asserting of their claims, they were thrown into the class of aliens by the natural and necessary effect of our pre-existing municipal regulations. It was too much for the *British* king to ask, (were he even impelled by a strong motive,) or for our government to grant, that the rights of escheat and forfeiture, accruing during the war, should be surrendered in relation to *British* subjects. Such a relinquishment, in itself, would not perhaps have been very important, had congress possessed adequate powers, but it might have carried with it the appearance of a concession, to which *America* would have been extremely averse; namely, that the doctrines of alienage did not attach here till the signature of the treaty; or, in other words, that we were not, until then, an independent nation! With respect to such acquisitions here, after the date of the treaty, (as in the case before us,) they stand upon a still weaker ground. It would have been most unreasonable for the *British* king to ask, or for us to grant, in favour of mere future and possible interests, that his subjects should be, in some sense, the same people with us, after we had established ourselves to be wholly independent of that nation; and that they should, without rendering us any services, or owing us any allegiance, be entitled, through all time, to important privileges in our country, which only the subjects of one of two of the most friendly and favoured nations were, at that time, permitted to enjoy. I will close this part of the subject by one general observation; and that is, that in all those of our treaties in which it was intended to yield up the laws of alienage in favour of the subjects of highly friendly and favoured nations, nay, even in the instrument of confederation itself, in relation to the citizens of the other states of the union, (see art. 4.) express, explicit, and appropriate terms are used to effect such surrender: whereas this is an attempt, under general and ambiguous expressions, (to admit the most,) to infer a surrender of those laws, and to create or enlarge interests in favour of the subjects of a nation, then certainly standing at the head of those the least favoured by *America*, and which has not been able to obtain from us up to this day, even by the famous treaty of 1794, the boon in question, in the extent now contended for!

I have avoided, as much as possible, in this whole discussion, having reference to that treaty: (the treaty of 1794:) I must, however, here repeat my remark, that that treaty has not left vested and existing rights to rest upon the same basis with future, contingent and possible ones; and that while that treaty has guaranteed, in a remarkable manner, the property in lands then actually holden in either country, it has offered those future and possible rights, together with this famous doctrine of legitimization, to perish in the quicksands of the revolution; to be cast into the fishomless vortex prepared, by that revolution, for all those parts and principles of the common law of *England*, which are heterogeneous to our republican institutions! If it should even (contrary to what seems to have been decided by the Supreme Court of the *United States* as before mentioned) be argued that that treaty protects and enlarges the null and defeasible interests acquired here by *British* subjects up to the time of its formation, it proves nothing in relation to the treaty of 1783, both because the present general government of the *United States* has powers, perhaps, competent to that purpose, and because the treaty of 1794 has used strong words to effect it; in both which important respects, the treaty of 1783 is widely different.

As the 5th article of the treaty only recommends to the several states to do what congress had no power to do absolutely, i. e. to refund money produced by confiscations, and if congress, as I contend, had no greater right to arrest property vested in the several states by their laws of alienage, than to demand the money contemplated by the 5th article, if such arrestation had been contemplated by the 6th article, would not the style of recommendation have been also kept up therein? and as there is a positive interdiction of "confiscations" stipulated by that article, shall we not infer from this change of style that it relates merely to such confiscations as congress possessed an absolute right to prohibit? It may not be improper to add, that another part of the terms of the clause in question seems to favour the construction I contend for. These terms are "that there shall be no future confiscations made." This term "made," seems strongly to import an active measure to effect a forfeiture, such as a legislative act, and not that kind of confiscation which is produced by the ordinary and passive operation of the law of escheat and forfeiture.

I have so far considered this case as if it were a case of forfeiture; whereas it is a right accruing to the commonwealth by way of escheat. Every thing that I have now said, to discriminate between forfeiture and confiscation, holds more strongly in relation to a right accruing by escheat. It is doing much more violence to the



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meaning of the latter term than the former, to make it synonymous with confiscation. I have also viewed it, in general, as if the descent in question had fallen prior to the date of the treaty of peace; whereas it was cast long after. Ours, therefore, is a much stronger case than that; for with respect to antecedent descents and purchases, there was some ground, or semblance of ground, for the treaty to operate upon; but, in this case, as the *antenati* pretension is entirely exploded, the present plaintiffs cannot recover, unless we are prepared to say that, (bating the treaty of 1794,) through all time, all *British* subjects, in cases like the present, are entitled to recover!!

The 4th inquiry I proposed to make under the head of the treaty, is in a great measure anticipated; I mean respecting the capacity of *British* subjects to sustain real actions. This right is, I think, incidental to the right to the subject. In all cases in which lands are preserved to *British* subjects, (for example, under the treaty of 1794,) their right to sue for them is also preserved; and this right forms, in that case, an exception to the general doctrine of alienage: but, on the other hand, where the principle does not exist, neither does the incident; they stand, or fall, together. While, therefore, I can never subscribe to the position, I had almost said the absurd position, taken by the plaintiffs, that all those are entitled to sue for lands here, who were so entitled at the time of their birth, under another government, of which they were then members, I can readily admit those to sue, in derogation from the general principle attaching a disability to aliens in this respect, to whom our laws or treaties have yielded a right to the subject sued for.

I have thus given to the treaty of peace a construction which outstrips and goes beyond the actual case before us. I have done this, not only because all the aspects of the case seem much involved with each other, but also for the reasons before assigned for discussing somewhat at large the pretensions of the *antenati*. My observations are so multifarious and desultory, that I fear I shall not be fully understood; but I have not time to reduce them to order, nor even to recapitulate.

The construction of the treaty, which I now contend for, has been impeached, loudly impeached, as gaining nothing for the other contracting party, by merely inhibiting legislative confiscations, while it leaves free the ordinary laws of alienage. To this objection I would answer, 1st. That that construction fully satisfies the words of the treaty, and goes the full length of the actual powers of the government of the confederation on the subject; 2dly. That it secures every thing for the refugees, whose interests were anxiously attended to by the *British* government in the formation of the treaty; 3dly. That it secures money and personal property to whomsoever belonging; there being no ordinary laws in any of the states to work a forfeiture of such property; and, 4thly. That if the ordinary laws of alienage cannot divest land actually holden here by *British* subjects at the time of our separation, (on which, however, I give no conclusive opinion,) my construction of the treaty abandons no claims of *British* subjects to lands in this country, but eventual, contingent and unlawful ones; unlawful, as being acquired at a time when they were equally interdicted by the laws, and by the actual state of things between the two countries; and that if our ordinary laws can divest such lands, (lands holden here in 1776,) it is meet that the *British* subjects should lose something by the war, when the *Americans* lost every thing. While we argue from what was incumbent upon the *British* king to do, on behalf of his people, we ought not to lose sight of a construction which respects the rights of the sovereign states of *America*, and the actual temper and situation of the times; we ought not to stickle for liberalities in favour of *British* subjects, when such were not the order of the day, and have not, in fact, been dealt out to us by them. It ought not, however, to be lost sight of as abridging the extent of this evil, (if it be one, and is not otherwise cured,) that in several of the states, (*Pennsylvania*, I am informed, for example,) no laws imposing forfeitures on account of alienage do exist, and that, therefore, as to those states, every possible end, to be desired in favour of *British* subjects, will be attained by confining the confiscations intended by the 6th article of the treaty to mean legislative confiscations merely.\*

I cannot dismiss this very important subject, without declaring my satisfaction to find the result of my inquiries entirely corroborated by a great authority. A production truly worthy of the pen of the author of the declaration of independence; a production which must ever rank high among the most distinguished of diploma-

\* As the Supreme Court of the *United States*, in the before mentioned case of *Dawson v. Godfrey*, seems to have disregarded the treaty of 1794, as applying to a descent to a *British* alien in 1793, possibly the construction of that instrument in favour of persons then "holding" lands, is to be restricted to cases in which a beneficial holding was permitted by the laws of some of the states: and if so, the ground of that construction equally applies to the treaty of peace, which has no words to shew that interests other than *beneficial* interests were intended, and may be satisfied, *pro tanto*, in such states as allow aliens to hold lands.

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the dissertations: which bears the most evident marks of the most patient and laborious investigation; an essay which confounded the *British* minister, and put him to silence, cannot but be considered by me as a great authority. *Americans* can never be indifferent to a work written by *Jefferson*, and sanctioned by *Washington*. I will even bring this work into a Court of justice, infinitely sooner than the *obiter dicta* of judges, pronounced without necessity, and founded on no deliberation. There is no magic in the name or character of judges, which will induce me to repel the ablest opinions, of the greatest men, on the most important subjects. Truth and right are my objects; and I will avail myself of all practicable means to endeavour to attain them.

*Mr. Hammond*, the *British* minister in this country, had made complaints on the very subject now before us; that is, the subject of infractions of the treaty of peace, and had invited the then secretary of state (*Mr. Jefferson*) to a discussion. He had complained, *inter alia*, of a decision, in the state of *Maryland*, on the subject of alienage, in the case of *Harrison's* representatives. He had complained of this decision; but although he was conjuring up all the infractions of the treaty which the wit of man could invent or suggest, he did not urge it as an infraction of the 6th article, nor even, in itself, of any article of that treaty. He did not urge this decision, or any other decision, as an infraction of that article interdicting "future confiscations," although he undoubtedly would have done so, had he concurred with the plaintiffs' counsel in the construction they now contend for. He has come into my construction of the treaty in this instance, by confining his list of infractions of the 6th article to legislative violations only; (see his letter, p. 15. of the correspondence;) he merely complained of the decision, in *Harrison's* case, as establishing a principle which, taken in connection with the laws of some of the states compelling creditors to receive lands in payment of their debts, infringing the fourth article of the treaty guarantying the *bona fide* payment of *British* debts. He complained that the fourth article of the treaty was infringed, or eluded, by compelling *British* subjects to receive lands in payment, while the decisions on the laws of alienage, did not permit them to hold such lands. (*Ibid.* p. 12.) This, then, seems to be the extent of his complaint on this head. Be that matter, however, as it may, the secretary of state obtained from the senators and delegates of the state of *Maryland*, in congress, the following statement in relation to that case of *Harrison's* representatives, viz. "on the disclosure of facts made by the trustees of the will of *Harrison*, upon oath, in chancery, in consequence of the claim made by the Attorney-General in behalf of the state, the Chancery Court determined it, in behalf of the state, it is believed, on this principle, that however *Great Britain* might consider the *antenati* as subjects born, and that they could not divest themselves of inheritable qualities, yet that the principle did not reciprocate on *America*, as those *antenati* of *Great Britain* could never be considered as subjects born of *Maryland*. The legislature, however, took the matter up, and passed an act relinquishing any right of the state, and directing the intention of the testator to take effect, notwithstanding such right. It is conceived that this was a *liberal and voluntary act*, on the part of the legislature, in behalf of *Harrison's* representatives, who are at liberty to pursue their claim." (a)

*Mr. Jefferson*, the secretary, taking up this case, upon the above report, observes; "The case of *Harrison's* representatives, in the Court of Chancery of *Maryland*, is in the list of infractions. These representatives being *British* subjects, and the laws of this country, like those of *England*, not permitting aliens to hold lands, the question was, whether *British* subjects were aliens. They declared that they were; consequently, that they could not take lands; and, consequently, also, that the lands in this case escheated to the state. Whereupon the legislature immediately interposed, and passed a special act, allowing the benefits of succession to the representatives. But had they not relieved them, the case would not have come under the treaty, as there is no stipulation, in that, doing away the laws of alienage, and enabling the members of each nation to inherit or hold lands in the other." (b)

I conclude, sir, as the best result of my judgment, that the law of this case is in favour of the defendant, and that the judgment of the District Court should be AFFIRMED.

(a) *Documents*, p. 96.

(b) *Jefferson's letter*, p. 36.



# AN INDEX

## TO THE

### PRINCIPAL MATTERS

#### CONTAINED IN THIS VOLUME.

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#### A

##### ABATEMENT.

1. A plea in *abatement* ought not to be received to set aside an office judgment, unless it be of matter which arose *purs darrein continuance*.  
*Bradley v. Welch*, 244

##### ABEYANCE.

1. See *INFANT*, No. 5, 6. *Templeman v. Steptoe*, 330

##### ACCOUNT.

1. When an account of an executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees, the executor or administrator need not be a party to a suit against such legatees or distributees for contribution. *Hooper and Wife v. Royter and Wife*, 119
2. An executor having delivered up the estate generally, and the management thereof, to one of the residuary legatees, for his benefit and that of his co-legatee; nine years and ten months having afterwards elapsed before he was summoned to render an account; the greater part of his executorship having moreover been during the revolutionary war; and the settlement taking place after his death; it was held *unreasonable rigour* to exact vouchers for many items in his account which appeared *probably*

just, though not supported by proof. *Fitzgerald, Ex'r of Jones, v. Jones*, 150

3. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree: neither, in such case, ought interest to be *allowed* him on payments to the legatees before the decree; though made in bonds which carried interest, *ib.*
4. Under circumstances a commission of 7 1/2 per cent. may be allowed an executor on all his receipts and disbursements; the *real and personal* estate having, in obedience to the directions of the will, been kept together and managed by him, *ib.*
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6. During the pendency of a suit in Chancery, a settlement of accounts between the parties having been made, and reported to the court; but, afterwards, *by mutual consent*, a new order of reference being made; the commissioner was not precluded from examining the accounts generally, and correcting any error therein; especially, as it appeared that the party who was benefited by such error had torn his own signature, and that of the other party, from the settlement. *Todd v. Bowyer*, 447

## ACTION.

1. Cannot be maintained on an administration bond, until a *devotavit* has been established by means of a second suit, after a judgment against the executor or administrator as such. *Gordon's Adm'r's v. The Justices of Frederick*, 1
2. *Covenant* (as well as *debt*) lies on a bond with collateral condition. *Ward v. Johnston*, 45
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4. See *DEBT*, No. 1. *Meredith's Adm'r v. Duval*, 76
5. If a prisoner depart from the prison rules by an *illegal* discharge from the sheriff, the creditor, having an assignment of the bond for keeping the rules, has his election to bring suit upon it, or to sue the sheriff, *ib.*
6. In an action on such bond, the plaintiff is only required to show a departure from the rules: the burden of proof then devolves on the defendant to show that the prisoner was discharged by *due course of law*, *ib.*
7. A husband surviving his wife (or, in case of his death afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate. *Chichester's Ex'r v. Vass's Adm'r*, 98
8. The taking in *execution* the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor. *Atwell's Adm'r's v. Towles*, 175
9. See *VENDOR AND VENDEE*, No. 7. *Hull v. Cunningham's Ex'r*, 330
10. Same point decided as in *Leftwich v. Berkeley*, 1 H. & M. 61. *Saulsbery v. Wood*, 406
11. *Assumpsit*, for use and occupation of land by permission of the plaintiff, lies on an *implied* as well as *express* promise. *Sutton v. Mandeville*, 407
12. If, in a suit upon a prison-bonds bond, a court of competent jurisdiction adjudge the bond void; the plaintiff may sue the sheriff, without appealing from the judgment, though erroneous. *Hose v. Tebbes and Wife*, 501
13. In such case, the sheriff, though not a party to the suit on the bond, is bound by the judgment unless he can prove it was obtained by collusion, *ib.*
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17. See *DEBTOR*, No. 3. *Dangerfield v. Rootes*, 529
18. See *MUTUAL ASSURANCE SOCIETY*, No. 1, 2. *Greenhow v. Barton*, 590

## ACTS OF ASSEMBLY.

1. An assignment made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act. *Meredith's Adm'r v. Duval*, 76

2. By virtue of the 24th section of the District Court law of 1792, the copies therein allowed, are good evidence in suits brought since that act took effect; although the filing of the originals was before that time. *Atwell's Adm'r's v. Towles*, 175
3. Interest on costs could not properly be allowed under the act of 1803, *Rev. Code*, v. 2. p. 30. c. 29. s. 5. So decided in *McRea v. Brown*, mentioned in note to *Atwell's Adm'r's v. Towles*, 179
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See *EXECUTORS AND ADMINISTRATORS*.

## AD QUOD DAMNUM.

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1. If a court give a *right judgment* for a *wrong reason*, it ought, nevertheless, to be affirmed. *Newell v. Wool*, 555

## AGENT.

1. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment, and the vendee, by constituting him his agent,

- makes him a competent witness to prove the notice. *Blair v. Owles*, 38.
2. See ATTORNEY IN FACT, No. 1, 2, 3. *Betts v. Cralle*, 238
3. See DEPOSITIONS, No. 3. *Marshall v. Frisbie*, 247
4. A landlord, by his agent, may levy a distress, but cannot sell the distrained effects. *Smiths v. Ambler*, 596

### AGREEMENT.

1. Where a judgment has been confessed by a principal, the security (if farther proceedings are had against him) ought to be permitted to plead *pro darrein continuance*, that such confession of judgment was by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal. *Ward v. Johnston*, 45
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4. See ATTORNEY IN FACT, No. 1, 2. *Betts v. Cralle*, 238
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6. See EQUITY, No. 18. *ib.*
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8. A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken, *ib.* 336
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1. A judgment at rules in the clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term; but, if it be entered as at rules only, it is merely a clerical misprision, and therefore amendable. *Digges's Ex'r v. Dunn's Ex'r*, 56
2. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. *Hunter v. Fairfax's Devisee*, 218
3. A sheriff may be permitted, by order of Court, to make a return upon an execution, or to amend it, according to the truth of the case,

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### ANSWER.

1. An answer filed in the name of one of three executors, (the decree being in favour of the plaintiff,) is not to be taken as their joint answer; notwithstanding the clerk in the transcript of the record says that they appeared by counsel, and filed their answer, and no steps were taken to compel a further answer from them. *Chinn v. Heale*, 63
2. An answer in Chancery (though, in form, responsive to a question put in the bill) is not evidence, where it asserts a right, affirmatively, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill. *Paynes v. Coles*, 378
3. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer, without proof, *ib.*

### APPEAL.

1. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made. *Hooper and Wife v. Rogers and Wife*, 119
2. An appeal, having been improvidently granted, was dismissed on motion five years after it was entered on the docket. *Clarke v. Conn*, 160
3. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses. *Eppes v. Cralle*, 258
4. An appeal from, or *supersedeas* to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only. *Bullitt's Ex'rs v. Winstons*, 269
5. Upon an appeal from a decree in Chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal. *Day v. Murdock*, 460
6. See COURT OF APPEALS, GENERAL RULE OF, relating to the correction of such errors as operate to the injury of the appellee, *ib.* in note.
7. If, in a suit upon a prison-bonds bond, a Court possessing competent jurisdiction adjudge the bond void, the plaintiff may sue the sheriff without appealing from the judgment, though erroneous. *Hoe v. Tedds and Wife*, 501
8. See APPEALS, (COURT OF,) No. 6. *Newell v. Wood*, 555
9. If a Court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed, *ib.*
10. In reviewing a judgment by default on a forthcoming bond, the Appellate Court will som-

pare it with the execution on which it was taken. *Glascock's Adm'r v. Dawson*, 605

### APPEALS, (COURT OF.)

1. See CERTIORARI, No. 1. *Hooper and Wife v. Register and Wife*, 119
2. See APPEAL, No. 1.
3. Neither consent, nor long acquiescence of parties can give the Court of Appeals jurisdiction. An appeal, therefore, (having been improvidently granted,) was dismissed on motion, five years after it was entered on the docket. *Clarke v. Conn*, 180
4. See APPEAL, No. 5. *Day v. Murdock*, 460
5. General rule relating to correction of errors, *ib.* in note.
6. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law. *Newell v. Wood*, 555
7. But such bond, though taken to the sheriff, as such, and to "his executors, administrators or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it, *ib.*
8. *Quere*, can such a bond, so taken, be assigned to the creditor by the succeeding sheriff? *ib.*
9. If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff, *ib.*
10. See BOND, No. 13, 14. *Stowell's Adm'r v. Towler*, 175
11. As to the nature of the proof requisite to affect an assignee, without notice, by an equity, See *Mayo v. Giles's Adm'r*, 533

### APPEARANCE.

1. Where two defendants have appeared and pleaded, an entry in the record that "the parties came, &c., and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. *Ward v. Johnston*, 45
2. Where appearance bail is required, the defendant cannot appear at the rules, without giving special bail. *Bradley v. Welch*, 234
3. An award made *pendente lite* cannot be given in evidence upon the plea of *non assumpsit*. *Harrison v. Brock*, 82
4. *Assumpsit*, for use and occupation of land by permission of the plaintiff, lies on an implied as well as express promise. *Sutton v. Mandeville*, 461

### ASSURANCE SOCIETY.

See MUTUAL ASSURANCE SOCIETY.

### ATTORNEY AT LAW.

1. The practice of law is not an office, or place, under the *Commonwealth*. *Leigh's case*, 468
2. An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 3d section of the act to suppress duelling, *ib.*

### ATTORNEY IN FACT.

1. If an attorney in fact undertake to have a tract of land (with the situation of which he does not profess himself personally acquainted) surveyed for a part thereof, and upon terms "in case the land cannot be found, to have a proportional part of the damages which may be recovered by his employer of the person of whom he bought, and a proportional part of his expenses paid," he is not bound to have it done at all events: but only to a faithful performance, according to the best information he can obtain. *Betts v. Cralle*, 238
2. In this case, therefore, the attorney in fact being imposed upon by the County Surveyor, and, in consequence of such imposition, having a survey made of land not purchased by his employer, was held not responsible for his mistake, and not thereby barred of his claims under the contract, *ib.*
3. But, after the survey, the employer having executed a bond to the attorney to make him a conveyance of part of the land so surveyed; and having snatched and torn the bond so

### APPELLEE.

See APPEAL.

### ARBITRAMENT.

1. The plea of "arbitrament and award" (in so many words) is a mere nullity. *Harrison v. Brock*, 92

### ASSETS.

1. A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshalling assets, against devisees of the landed property, until he has fully prosecuted his claim at law, against the executor and his securities. *Mason's Devisees v. Peter's Adm'r*, 437
2. A judgment by default, against an executor, is *prima facie* admission of assets, *ib.*
3. See EXECUTORS AND ADMINISTRATORS, No. 14.
4. See EQUITY, No. 28. *ib.*

### ASSIGNMENT.

1. An assignment made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act. *Meredith's Adm'r v. Duval*, 76
2. A bond for keeping the prison rules should be

given; for which trespass a suit was threatened; and, thereupon, having given two bonds for money, in full satisfaction for tearing the above bond, and for the attorney's services; the last-mentioned bonds were considered as a bar to any claim of the attorney under the original contract, and adjudged valid and obligatory, notwithstanding the mistake in the survey was not discovered until after those bonds were executed. *Betts v. Cralle*, 238

4. A landlord, by his agent, may levy a distress, but cannot sell the distrained effects. *Smiths v. Ambler*, 596

### AUTHORITY.

1. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance. *Yancey v. Hopkins*, 419

### AWARD.

1. An award, made *pendente lite*, cannot be given in evidence upon the plea of *non assumpsit*. *Harrison v. Broch*, 22  
2. The plea of "arbitrament and award" (in so many words) is a mere nullity, and no evidence should be received to support it, notwithstanding the plaintiff replied generally, *ib.*

### B

### BAIL.

1. Where appearance bail is required, the defendant cannot appear *as the rules*, without giving special bail. *Bradley v. Welch*, 234

### BAR.

1. The taking in execution the body of one of two joint obligors is no bar to an action against the other obligor. *Atwell's Adm'r v. Towles*, 175  
2. See ATTORNEY IN FACT, No. 1, 2, 3. *Betts v. Cralle*, 238

### BARGAIN AND SALE.

1. A patentee of land, without personally entering upon it, has such *seisin* as may be transferred and continued by deed of bargain and sale; but if his *seisin* be interrupted by the actual entry and *adverse possession* of another, he cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment. *Clay v. White*, 162

### BILL IN CHANCERY.

#### See EQUITY.

1. A decree, dismissing so much of a bill as claims one of two separate subjects in controversy, and, as to the other, determining also the

rights of the parties, but directing an account to be taken, is not final in any respect between the parties retained in Court and their legal representatives, but subject to revision and alteration in every part, at any time before a final decree; without the necessity of a bill of review. *Templeman v. Steptoe*, 330

2. See DOWER, No. 1, 2. p. 554. note: and same note, p. 555.

### BOND.

1. An action cannot be maintained on an administration bond, until, after a judgment against the executor or administrator as such, a *devastavit* has been established by means of a second suit. *Gordon's Adm'r v. The Justices of Frederick*, 1

2. *Covenant* (as well as *debt*) lies on a bond with collateral condition. *Ward v. Johnston*, 45

3. As to the method of assigning breaches in such action of covenant, *ib.*

4. A co-obligor, in a joint and several bond, may (though described as a *security*) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W. his security, shall, &c., then this obligation to be void," &c. *ib.*

5. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other *specific lands* to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable. *Chim v. Heale*, 68

6. In debt on a bond, if the defendant craves *oyer*, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond; and, though the plaintiff declare against one of several obligors, without stating that they were *severally bound*, yet, if the bond appear to be *joint and several*, it is sufficient. *Meredith's Adm'r v. Duval*, 76

7. An assignment made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act, *ib.*

8. A bond for keeping the prison rules should be taken to the sheriff for the time being, and his successors in office; not his executors, administrators or assigns, *ib.*

9. But such bond, though taken to the sheriff as such, and to "his executors, administrators or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it, *ib.*

10. *Quere*, can such a bond, so taken, be assigned to the creditor by the succeeding sheriff? *ib.*

11. If the prisoner depart from the rules by an *illegal* discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff, *ib.*

12. In an action on such bond, the plaintiff is only required to shew a departure from the



- rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law. *Meredith's Adm'r v. Duval*, 76
13. At the foot of a bond, with a penalty and condition in the usual form, signed and sealed by I. S., a writing is signed and sealed by T. A., in the following words: "I, T. A., join in the above obligation with I. S., and am his security for the above sum of —, (mentioning the sum specified in the condition,) this, it seems, is a joint obligation; and judgment may be rendered against T. A. for the penalty, to be discharged by the sum in the condition, with interest. *Atwell's Adm'r v. Towles*, 175
14. An assignment of such an instrument, by the words, "I assign the within obligation," is a good assignment of the claim upon T. A. as well as I. S., *ib.*
15. *Quere*, whether a declaration against the administrator of one of two joint obligors, averring that neither the defendant, nor the other obligor, nor any representative of his had paid the debt; (without stating that such other obligor was dead, or that the defendant's intestate had survived him;) and alleging, in assigning the breach, that right of action had accrued under the premises, against the defendant's intestate, (without setting forth in what manner,) be good after verdict? *ib.*
16. In an action of debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest: and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty, *ib.*
17. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor, *ib.*
18. See ATTORNEY IN FACT, No. 1, 2, 3. *Betts v. Cralle*, 238
19. See VENDOR AND VENDEE, No. 7. *Hull v. Cunningham's Ex'r*, 330
20. Same point decided as in *Lestwich v. Berkeley*, 1 H. & M. 61. *Saunders v. Wood*, 406. *Newell v. Wood*, 555
21. A scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appear, from some expression in the body of the instrument, that it was intended as such. *Austin's Adm'r v. Whitlock's Ex'r*, 487
22. See PRISON RULES, No. 8, 9, 10, 11. *Hoe v. Tebbes and Wife*, 501
23. Although the assignee of a bond, with or without notice, takes it subject to all the equity of the obligor, yet such equity must be clearly and manifestly established by proof, before it shall affect an assignee without notice; especially, if the obligor, after the assignment, promise payment of the full amount of the bond to the assignee. *Mayo v. Giles's Adm'r*, 583
24. The Court of Appeals has jurisdiction to reverse any judgment on a bond, provided the penalty amount to the sum limited by law. *Newell v. Wood*, 555
25. A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond; unless it appear that such bond was taken by a sheriff, or other officer legally authorized to make distress, and sell the distrained effects. *Smith v. Ambler*, 596  
See FORTHCOMING BOND, No. 1, 2. *Glascock's Adm'r v. Dawson*, 605

## BOUNDARIES.

1. In ejectment, if the jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part, with so much precision as that possession thereof may with certainty be delivered; a *venue de novo* ought to be awarded. *Clay v. White*, 168

## BREACHES.

1. In an action of covenant on a bond with collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty; but, where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach. *Ward v. Johnston*, 46
2. See DECLARATION, No. 4. *Atwell's Adm'r v. Towles*, 175
3. See COVENANT, No. 4. *Austin's Adm'r v. Whitlock's Ex'r*, 487

## BREACH OF TRUST AND CONFIDENCE

1. Is a circumstance from which FRAUD may be presumed. *Whitehorn and Wife v. Hines and others*, 557

## BRITISH SUBJECTS.

1. See TREATY, No. 1. *Hunter v. Fairfax's Devisee*, 918

## C

## CAVEAT.

1. In cases in which the regular remedy is by caveat, a Court of Equity may entertain jurisdiction, under circumstances which render its interposition just and proper, but such circumstances must be made to appear to the satisfaction of the Court. *Depew v. Howard and Wife*, 295

## CERTAINTY.

1. *Quere*, whether an entry, for a certain number of acres, "on the waters of Glade creek, joining the lines of I. H.'s land, and the locator's own land on W.'s run," be sufficiently certain? *Depew v. Howard and Wife*, 293
2. The rule that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to

designate with any certainty the particular land in question. *Lewis v. Madisons*, 303

### CERTIORARI.

1. In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court," and the answer having admitted that such a suit was brought, and such a decree, as stated in the bill, existed; the Court of Appeals will award a writ of *certiorari* for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer. *Hooper and Wife v. Royster and Wife*, 119

### CHANCERY.

1. As to the liability in equity of a purchaser having notice of an encumbrance; see *Blair v. Owles*, 38
2. In a suit against such purchaser, a person who joined the *vendor* in the deed, for the purpose of relinquishing a collateral claim, need not be a party, *ib.*
3. An answer filed in the name of one of three executors (the decree being in favour of the plaintiff) is not to be taken as their joint answer. See ANSWER, No. 1. *Chinn v. Heale*, 63
4. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law. *Chinn v. Heale*, 63
5. In cases where it is proper and necessary to go into equity for a discovery, the Court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law. *Chichester's Ex'x v. Vass's Adm'r*, 98
6. In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court;" and the answer having admitted that such a suit was brought, and such a decree as stated in the bill existed; the Court of Appeals will award a writ of *certiorari* for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer. *Hooper and Wife v. Royster and Wife*, 119
7. An administrator to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the award, to prove the payment of the money to her guardian; though the latter was no party to the decree, *ib.*
8. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the

Chancellor, but will itself direct such parties to be made. *Hooper and Wife v. Royster and Wife*, 119

9. In a suit for contribution against legatees or distributees, the executor or administrator; or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees, *ib.*
10. In what case interest ought to be charged against an executor from the date of the decree only. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
11. On a settlement of accounts in a Court of Equity, a decree will be rendered against a plaintiff for a balance of account appearing due to a defendant, *ib.*
12. See INTEREST, No. 9.
13. See JURISDICTION, No. 3. *Déprez v. Howard and Wife*, 233
14. See DECREE, No. 8, 9. *Templeman v. Steptoe*, 339
15. An answer in Chancery (though, in form, responsive to a question put in the bill) is not evidence, where it asserts a right, affirmatively, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill. *Paynes v. Coles*, 373
16. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer, without proof. Neither is this rule to be varied by the circumstance that *infants* are interested, *ib.*
17. See EQUITY, No. 23, 23.
18. See EQUITY, No. 24. *Fancey v. Hopkins*, 419
19. See EQUITY, 29, 30. *Todd v. Bowyer*, 447
20. See MORTGAGE, No. 1. *Green v. Price*, 449
21. See PURCHASE, No. 1. *Day v. Murdoch*, 460
22. See APPEAL, No. 5, 6.
23. See INJUNCTION, No. 2. *Humphrey's Adm'r v. McClenachan's Adm'r and Heirs*, 493
24. See VENDOR AND VENDEE, No. 12, 13. same case, p. 506
25. See SET-OFF, No. 1. *Dangerfield v. Rootes*, 529
26. See DOWER, No. 1, 2. note to p. 554. and 555.
27. See EQUITY, No. 39. *Whitehorn and Wife v. Hines and others*, 557
28. See FRAUD, No. 4.
29. See EQUITY, No. 43. *Moon v. Campbell*, 604

### CLERICAL OMISSION.

1. See DEPOSITIONS, No. 1. *Marshall v. Frisbie*, 247

### COLLATERAL CLAIM.

1. A person who joined in a deed for the purpose of relinquishing a collateral claim need not be a party to a suit in equity, by the claimant of an encumbrance, against a purchaser having notice. *Blair v. Owles*, 38

## COLLATERAL CONDITION.

1. *Covenant* (as well as *debt*) lies on a bond with collateral condition. *Ward v. Johnston*, 45.
2. As to the manner of assigning breaches in such action of *covenant*, *ib.*
3. An assignment made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act. *Meredith's Adm'r v. Duval*, 76.

## COMMISSIONER IN CHANCERY.

See ACCOUNT.

## COMMISSIONERS OF THE REVENUE.

1. See LANDS, No. 24, 25. *Fancey v. Hopkins*, 419.

## COMMISSIONS ON MONEY.

1. Under circumstances a commission of 7 1-3 per cent. may be allowed an executor on all his receipts and disbursements; the real and personal estate having, in obedience to the directions of the will, been kept together and managed by him. *Fitzgerald, Ex'r of Jones, v. Jones*, 150.

## COMMISSIONS TO TAKE DEPOSITIONS.

1. See DEPOSITIONS, No. 1, 2, 3, 4. *Marshall v. Friebie*, 247.

## COMMON LAW.

1. *Quere*, whether a security is exonerated at common law, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution, by an agreement to which the security was not a party? *Ward v. Johnston*, 45.

## COMMONWEALTH.

1. The practice of LAW is not an office, or place, under the Commonwealth. *Leigh's case*, 468.

## COMPENSATION.

1. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable. *Chinn v. Heale*, 63.
2. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the

deficiency, and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law. *Chinn v. Heale*, 63.

See DEFICIENCY, No. 3, 4, 5, 6. *Hall v. Cunningham's Ex'r*, 330, 338.

See VENDOR AND VENDEE, No. 10, 11, 12, 13. *Humphrey's Adm'r v. Mc'Clenahan's Adm'r and Heirs*, 483, 500.

## COMPROMISE.

1. An attorney in fact having, by mistake, had a survey made of land not belonging to his employer; but, after the survey, the employer having executed a bond to make him a conveyance of part of the land so surveyed; and having snatched and torn the bond so given; for which trespass a suit was threatened; and thereupon two bonds for money being given by the employer, in full satisfaction for tearing the above bond, and for the attorney's services; the last-mentioned bonds were considered as a bar to any claim of the attorney under the original contract, and adjudged valid and obligatory, notwithstanding the mistake in the survey was not discovered until after those bonds were executed. *Betts v. Cralle*, 238.

## CONDITION.

1. In an action of *covenant* on a bond with collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breaches assigned should be the failing to pay the penalty; but where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach. *Ward v. Johnston*, 45.
2. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W. his security, shall, &c. then this obligation to be void," &c. *ib.*
3. See BOND, No. 13. *Atwell's Adm'r v. Truvel*, 175.

## CONFESSION.

1. Where two defendants have appeared and pleaded, an entry in the record "that the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. *Ward v. Johnston*, 45.
2. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other, *ib.*
3. In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal,

pal; the Court, in reversing the judgment, ought to have given the security leave to plead *pursuere darrein continuance*; all the proceedings having been brought up by a writ of *superædecas*. *Ward v. Johnston*, 45

4. *Quere*, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party? *ib.*

### CONFISCATION.

1. See ESCHEAT, No. 3. PURCHASE, No. 1. *Day v. Murdoch*, 460

### CONSENT

1. Of parties, cannot give the Court of Appeals jurisdiction. *Clarke v. Conn*, 160
2. In what cases it may be presumed to have been given to the taking of depositions. See DEPOSITIONS, No. 1. and 3.
3. See RECORD, No. 4. *Chapmans v. Chapman*, 398
4. See ACCOUNT, No. 6. *Todd v. Bowyer*, 447
5. A mortgagee without notice shall be protected against a prior equitable title; if the person having such title either encouraged him to take the mortgage, or, knowing of his intention to take it, stood by, and made no objection. *Green v. Price*, 449

### CONSIDERATION.

1. See CONTRACT, No. 8. *Lewis v. Madisons*, 303
2. A deed from a husband and wife, without her privy examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance. *Harvey and Wife v. Pecke*, 518
3. Gross inadequacy of consideration is a circumstance from which fraud may be presumed in a Court of Equity. *Whitehorn and Wife v. Hines and others*, 557

### CONSTRUCTION OF LAWS.

See ACTS OF ASSEMBLY. TREATY.

### CONSTRUCTION OF WILLS,

1. In construing wills, the cardinal rule is to collect the intention of the testator from the whole will taken together, without regard to any thing technical, or any particular form of words; and if such intention be lawful, (as not creating perpetuities, or the like,) full effect ought to be given to it by the Courts. *Wyatt v. Snider's Heirs, and Johnson and others v. Johnson's Widow and Devisees*, 537. and 549

### CONTRACT.

1. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W.'s security, shall, &c., then this obligation to be void," &c. *Ward v. Johnston*, 45
2. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable. *Chinn v. Heale*, 63
3. If A. promise B. that if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters as fast as it is in his power with convenience," and the marriage be afterwards had with his consent: the promise is sufficiently certain and obligatory. *Chichester's Ex'x v. Vass's Adm'r*, 98
4. In such case, A. has not his life-time to perform it in; but, in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to B. and wife, equal to the largest made to his other daughters, *ib.*
5. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and, if he survive the wife, may sue in his own right to recover damages for a breach, *ib.*
6. A husband surviving a wife (or, in case of his death afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate, *ib.*
7. See ATTORNEY IN FACT, No. 1, 2. *Betts v. Gralle*, 238
8. It seems, that a contract, under seal, between two brothers, by which one of them, for a fair and valuable consideration, agrees, that, when he shall obtain possession of a tract of land expected to be devised to him by their father, he will convey it to the other, is not *contra bonos mores*, and may support an action of covenant at law, or be enforced specifically in a Court of Equity. *Lewis v. Madisons*, 303
9. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question, *ib.*
10. See PURCHASER, No. 9, 10, 11, 12. *Hull v. Crippenham's Ex'r*, 330. 336. 338

11. See COVENANT, No. 4. *Austin's Adm'r v. Whitlock's Ex'rs*, 487  
 12. See VENDOR AND VENDEE, No. 10, 11, 12, 2.  
 13. *Humphrey's Adm'r v. M'Clenachan's Adm'rs and Heirs*, 493. 500

## CONTRIBUTION.

1. In a suit for contribution against legatees or distributees, the executor or administrator when to be a party, and when not. *Hooper and Wife v. Royster and Wife*, 119

## CONVEYANCE.

1. Notice of a lien or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance. *Blair v. Owles*, 34  
 2. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party, *ib.*  
 3. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever, *ib.*  
 4. A person out of possession cannot convey by bargain and sale such a title as will enable the bargainee to recover in ejectment. *Clay v. White*, 162  
 5. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. *Lewis v. Madisons*, 303  
 6. See DEED, No. 6. *Yancey v. Hopkins*, 419  
 7. See INFANT, No. 9. *ib.*  
 8. See HEIRS, No. 2. *Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs*, 493  
 9. See VENDOR AND VENDEE, No. 12, 13. *same case*, 500  
 10. See HUSBAND AND WIFE, No. 7. *Harvey and Wife v. Pecks*, 518  
 11. What are badges of fraud in obtaining a deed, *ib.*  
 13. Under what circumstances a deed obtained from a man of weak understanding may be set aside in equity. *Whitehorn and Wife v. Hines and others*, 557  
 14. See PURCHASER, No. 20, 21, *ib.*

## COPIES.

1. By virtue of the 24th section of the District Court law of 1792, the copies therein allowed are good evidence in suits brought since that act took effect; although the filing of the originals was before that time. *Atwell's Adm'rs v. Towles*, 175

## COSTS.

1. Interest on costs could not properly be allowed under the act of 1803, 2 Rev. Code, p. 30. c.

20. a. 5. So decided in *M'Rea v. Brown*, note to p. 179

2. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses. *Eppes v. Cralle*, 258

## COURT.

1. The Jury and not the Court, are exclusively judges of the credibility of witnesses. *Harrison v. Brock*, 23  
 2. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence, *ib.*  
 3. The Court ought not to trust the Jury with illegal or improper evidence, however important it may be to the cause. *Brown and Boisseau v. May*, 229  
 4. If a Court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed. *Newell v. Wood*, 553

## COVENANT.

1. Covenant (as well as debt) lies on a bond with collateral condition. If there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty; but where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach. *Ward v. Johnston*, 45  
 2. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W. his security, shall, &c. then this obligation to be void," &c. *ib.*  
 3. See CONTRACT, No. 8. *Lewis v. Madisons*, 303  
 4. In covenant, on an agreement to convey the party's interest in a certain suit, and (in case the defendant in that suit was not legally bound by his undertaking) then to convey the right of such party to certain land, a declaration charging a refusal to convey the interest in the suit, or the right to the land, (without setting forth the failure to recover in the suit, and a subsequent refusal to convey the land,) is substantially defective, and not to be cured, by a general verdict, assessing entire damages. *Austin's Adm'r v. Whitlock's Ex'rs*, 487  
 5. See VENDOR AND VENDEE, No. 10, 11, 12, 13. *Humphrey's Adm'r v. M'Clenachan's Adm'rs and Heirs*, 493. 500

## CREDIBILITY.

1. The Jury, and not the Court, are exclusively judges of credibility. *Harrison v. Brock*, 23

CREDITOR.

1. The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees: but the sheriff cannot legally discharge him, unless he be actually insolvent, and being so, the plaintiff, having notice thereof, refuse to pay his fees, or to give bond for the payment thereof. *Meredith's Adm'r v. Duval*, 76
2. If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff, *ib.*
3. In an action on such bond, the plaintiff is only required to shew a departure from the rules; the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law, *ib.*
4. See PAPER MONEY, No. 3. *Day v. Murdoch*, 460
5. See DEBTOR, No. 3. *Dangerfield v. Rootes*, 529

D

DAMAGES.

1. What circumstances ought not to be received in evidence, by way of mitigation of damages on a joint plea of "not guilty," in trespass *vi et armis*, against two defendants for breaking the plaintiff's close, and beating his slaves. *Brown and Baisseau v. May*, 288

DEBT.

1. In debt, on a bond, if the defendant crave *oyer*, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond; and, though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient. *Meredith's Adm'r v. Duval*, 76
2. In debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest: and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty. *Atwell's Adm'r v. Towles*, 175
3. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor, *ib.*
4. Prior to the 1st of May, 1804, the Courts of Chancery, on debts not bearing interest in terms, could not grant interest subsequent to the date of the decree. *Dilliard v. Tomlinson, &c.* 183

DEBTOR.

1. A debtor within the prison rules is still a true prisoner in the eye of the law; and, as such, should be transferred by the sheriff to his successor in office. *Meredith's Adm'r v. Duval*, 76

2. See PAPER MONEY, No. 3. *Day v. Murdoch*, 460
3. A debtor ought not to be allowed a set-off (even in equity) for unliquidated and disputed claims against his creditor, purchased by him after suit brought by the creditor against him. *Dangerfield v. Rootes, Adm'r of Baylor*, 529

DECLARATION.

1. In debt on a bond, if the defendant crave *oyer*, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond; and, though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient. *Meredith's Adm'r v. Duval*, 76
2. If a judgment of a County Court be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial. *Digges's Ex'r v. Dunn's Ex'r*, 56
3. The plaintiff in ejectment may recover less land than the quantity stated in his declaration. *Clay v. White*, 162
4. *Quere*, whether a declaration against the administrator of one of two joint obligors, averring that neither the defendant, nor the other obligor, nor any representative of his, had paid the debt; (without stating that such other obligor was dead, or that the defendant's intestate had survived him;) and alleging, in assigning the breach, that right of action had accrued, under the premises, against the defendant's intestate, (without setting forth in what manner,) be good after verdict? *Atwell's Adm'r v. Towles*, 175
5. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. *Hunter v. Fairfax's Devisee*, 218
6. See COVENANT, No. 4. *Austin's Adm'r v. Whitlock's Ex'rs*, 487

DECREE.

1. An administrator, to whom a credit, for a sum of money paid by him to the guardian of one of the distributees, has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree. *Hooper and Wife v. Royster and Wife*, 119
2. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made, *ib.*
3. In what case interest ought to be charged against an executor from the date of the decree only. *Fitzgerald, Ex'r of Jones, v. Jones*, 151
4. On a settlement of accounts in a Court of Equity,

- a decree will be rendered, against a plaintiff for a balance of account appearing due to a defendant. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
5. Prior to the 1st of May, 1804, the Courts of Chancery, on debts not bearing interest in terms, could not grant interest subsequent to the date of the decree. *Dillard v. Tomlinson, &c.* 183
6. A decree, dismissing so much of a bill as claims one of two separate subjects in controversy, and, as to the other, determining also the rights of the parties, but directing an account to be taken, is not final in any respect, between the parties retained in Court, and their legal representatives; but subject to revision and alteration in every part, at any time before a final decree; without the necessity of a bill of review. *Templeman v. Steptoe*, 339
7. *Quere*, in such case, whether any subsequent decree could affect the rights of bona fide purchasers of property as to which the bill was dismissed, *ib.*
8. A decree against devisees, holding by several and distinct devises, ought not to be joint, but pro rata. *Mason's Devisees v. Peter's Adm'rs*, 437
9. *See EQUITY*, No. 28. *ib.*
10. *See APPEAL*, No. 5, 6. *Day v. Murdoch*, 460
11. *See INJUNCTION*, No. 2. *Humphrey's Adm'r v. Mc'Clenachan's Adm'r and Heirs*, 500
12. *See EQUITY*, No. 43. *Moon v. Campbell*, 604
7. *See INFANT*, No. 9. *Yancey v. Hopkins*, 449
8. *See SCROLL*, No. 1. *Austin's Adm'r v. Whitlock's Ex'rs*, 447
9. *See VENDOR AND VENDEE*, No. 10, 11, 12, 13. *Humphrey's Adm'r v. Mc'Clenachan's Adm'rs and Heirs*, 493, 500
10. A deed from a husband and wife without her privy examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance. *Harvey and Wife v. Peckes*, 518
11. What are badges of fraud in obtaining a deed, *ib.*
12. Under what circumstances, a deed, obtained from a man of weak understanding, (though not an idiot or lunatic,) may be set aside in equity. *Whitehorn and Wife v. Bines and others*, 557
13. *See FRAUD*, No. 4. *ib.*
14. *PURCHASER*, No. 20, 21. *ib.*

## DEFAULT.

1. In reviewing a judgment by default, on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken. *Glassecock's Adm'r v. Dawson*, 605

## DEFENDANT.

1. Where two defendants have appeared and pleaded, an entry in the record that "the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. *Ward v. Johnston*, 45
2. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other, *ib.*
3. In an action on a prison-bonds bond, the plaintiff is only required to shew a departure from the rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law. *Meredith's Adm'r v. Duval*, 76
4. On a settlement of accounts in a Court of Equity, a decree will be rendered, against a plaintiff, for a balance of account appearing due to a defendant. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
5. An appeal from, or *superseas* to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only. *Bullitt's Ex'rs v. Winstons*, 269
6. A defendant, against whom an execution issued, may move to *quash* it, though not levied on his property, but on that of a co-defendant only. *Note to p.* 284
7. *See ANSWER*, No. 2. *Puynes v. Coles*, 373
8. *See EVIDENCE*, No. 17. and 18. *Chapman v. Chapman*, 398
9. *See INJUNCTION*, No. 1 *Todd v. Bowyer*, 417
1. Notice of a *lien* or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance. *Blair v. Owles*, 38
2. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party, *ib.*
3. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever, *ib.*
4. A person out of possession cannot convey by bargain and sale such a title as will enable the bargainee to recover in ejectment. *Clay v. White*, 162
5. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a *lien* claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. *Lewis v. Madisons*, 303
6. If land be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser; it seems, that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may be cancelled, and a release or reconveyance of the land decreed. *Yancey v. Hopkins*, 419

## DEED.

12. See EJECTMENT, No. 5, 6. *Clay v. Ransome*, 454
11. GENERAL RULE OF THE COURT OF APPEALS, relative to errors operating to the injury of a defendant in error. *Day v. Murdoch*, 460. in note.

### DEFICIENCY.

1. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other *specific lands* to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable. *Chinn v. Heule*, 63
2. What relief a Court of Equity will give where the suit is for a conveyance of a specific tract of land, and of other lands to make up a deficiency of quantity, but the plaintiff appears entitled to compensation in money, and not in lands, *ib.*
3. Though land be sold in gross, for so much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency. *Hull v. Cunningham's Ex'r*, 330
4. What is the measure of relief in such case, if the purchaser do not lose the land he expected to get, but make an entry and obtain a patent, *ib.*
5. Upon a special agreement to take the risk upon himself, the purchaser is entitled to *no* relief, *ib.* 336
6. See note to the same case, 338
7. In what case compensation shall be made for a deficiency resulting from a previous contract to allow the locator one third of the land. *Humphrey's Adm'r v. McEnachan's Adm'r and Heirs*, 493
8. What decree a Court of Equity may make on a bill of injunction exhibited by the administrator of the purchaser against the administrator and heirs of the vendor claiming compensation for a deficiency, credits for payments and a conveyance, *ib.*
9. In case of a deficiency in lands sold, the value at the time of the contract is the measure of compensation; of which value the purchase-money is the standard, where it does not appear that the actual value was different. *Same case*, p. 500

### DEMURRER TO EVIDENCE.

1. Although, upon a demurrer to evidence, the testimony adduced on both sides ought regularly to be stated, yet, if it be parol and contradictory, the party tendering the demurrer cannot, after exhibiting his testimony, compel the other party to join in demurrer; for this, in effect, would be to enable the demurrant to confer credibility on his own witnesses, or at least to carry their credibility to be adjudged by an improper tribunal; the *Jury* and not the

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Court being exclusively judges of credibility *Harrison v. Brock*, 2

2. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, erroneously compelled the other party to join in demurrer to evidence, 25

### DEPOSITIONS.

1. An order of Court granting leave to take a deposition in the city of *Philadelphia*, being, "by consent of parties that a commission issue to any four aldermen of the said city and *W. K.*," and a subsequent order (also by consent granting "new commissions to take depositions;" a commission issuing afterwards "to *R. K. alderman* of the city of *Philadelphia*, and four other persons by name," not said to be aldermen, (and omitting *W. K.*), "any three of whom to act, if the whole cannot," should be presumed to have been directed to persons agreed upon by the parties, but whose names were omitted by the clerk in entering the last order; no objection having been made in the Court below, on account of any real or supposed variance between the first and second orders, and the commission. *Marshall v. Frisbie*, 24
2. A commission directed to five persons, ("any three of whom to act,") cannot be executed by one only; and a return, by one, that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who were present, *ib.*
3. A deposition taken at a time and place not mentioned in the notice, may be read as evidence an agent, of the party to whom the notice was given, duly authorized to attend to the taking of such deposition, having appeared at the time and place appointed, and consented to postponement to such other time and place. And if, in other respects, the commission be regularly executed and returned, the Court will presume from circumstances that the person who gave the consent was the authorized agent of the party, *ib.*
4. *Quere*, whether commissioners appointed to take depositions can, "by their own mere authority, adjourn the taking thereof to any other convenient time and place, in the event that the business cannot readily be finished at the day, and at the place, to which the notice applies;" no intended adjournment, from day to day until the business be finished, being expressed in such notice?

### DEPRECIATION.

1. Money received, by a guardian for a ward during the paper money times, ought to be reduced by the scale of depreciation; (to be applied as on the last day of the year in which it was received. *Hooper and Wife v. Royster and Wife*, 1)
2. If money was received, by a guardian for a ward within six months previous to the 1st of *January, 1777*, (when the scale of depreciation commenced,) it should be reduced accord-



to the seals, as at the end of six months from the time when received. *Hooper and Wife v. Royster and Wife*, 119

## DESCENTS.

- See DISTRIBUTION, No. 1, 2, 3.
- The profits of the estate of an infant dying intestate accruing in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person, or persons, inheriting such estate generally. *Dillard v. Tomlinson, &c.* 183
- See TREATY, No. 1. *Hunter v. Fairfax's Devisee*, 218
- Construction of the 5th, 6th, and 7th sections of the act "to reduce into one the several acts directing the course of descents. *Templeman v. Steptoe*, 339
- Where an infant, having title to a real estate of inheritance derived by purchase or descent immediately from the father, dies without issue, and with no brother or sister, or descendant of either; the father being dead, but the mother living, the right of inheritance is not in abeyance, but goes in parcenary to the brothers and sisters of the father, or their lineal descendants, *ib.*
- And, *vice versa*, such estate being derived immediately from the mother; and she being dead, but the father living; it goes in parcenary to her brothers and sisters, or their lineal descendants, *ib.*
- The law was the same as to personal estate, between the 1st of October, 1793, and the 2d of January, 1802, *ib.*

## DEVASTAVIT

1. Must be established by means of a second suit, (after a judgment against an executor or administrator as such,) before an action can be maintained on the administration bond. *Gordon's Adm'rs v. The Justices of Frederick*, 1

## DEVIATION.

1. What is such a deviation, from the voyage, as will prevent the person insured from being entitled to a return of premium, on a marine insurance, "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond." *Marine Insurance Company of Alexandria v. Stras*, 408

## DEVISE.

1. A patentee of land, without personally entering upon it, has such *seisin* as may be transferred and continued by devise. *Clay v. White*, 162
2. *Quere*, as to the effect of a devise to a British subject between the 4th of July, 1776, and the date of the treaty of 1783? *Hunter v. Fairfax's Devisee*, 218
3. *Quere*, whether a Court of Equity ought, under any circumstances, to assist, to the preju-

dice of a *posthumous child*, the claims of *devotion* under a will, made before the 1st of January, 1787, by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy? *Paynes v. Coles*, 373

4. See ASSETS, No. 1. *Mason's Devisee v. Peter's Adm'rs*, 437
5. A judgment against the executor is no evidence against the heirs or devisees of the real estate, *ib.*
6. A decree against devisees, holding by several and distinct devises, ought not to be joint, but *pro rata*, *ib.*
7. See EQUITY, No. 28.
8. See WILLS, No. 4, 5, 6, 7. *Wyatt v. Sadler's Heirs*, 337, and *Johnson and others v. Johnson's Widow and Heirs*, 549

## DISCOVERY.

- See RELIEF, No. 1. *Chinn v. Heale*, 63
- In cases where it is proper and necessary to go into equity for a discovery, the Court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law. *Chichester's Ex'rs v. Vase's Adm'r*, 98

## DISTRESS.

1. A landlord is not entitled to the summary remedy by motion, on a three months' *replevin* bond; unless it appear that such bond was taken by a sheriff, or other officer legally authorized to make distress, and sell the distrained effects. *Smiths v. Ambler*, 596
2. A landlord, in person, or by a private agent, may levy a distress: but cannot sell the distrained effects, which, in such case, are only to be held as a pledge, to compel the tenant to pay the rent, *ib.*

## DISTRIBUTEES.

1. An administrator, to whom a credit, for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree. *Hooper and Wife v. Royster and Wife*, 119
2. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees, *ib.*

## DISTRIBUTION.

1. It is now settled, that the mother of an infant who died intestate, between the 1st of October,

- 1793, (when the suspended acts of 1792 took effect,) and the 3rd of January, 1802, (when the act "concerning the distribution of unbequeathed personal estate," was passed,) or any of her issue, by a person other than the father, was not entitled to any part of such infant's personal estate derived immediately from the father. *Dilliard v. Tomlinson, &c.* 183
2. But the law was otherwise relative to the property of an infant who died intestate, between the 1st of January, 1787, (when the acts of 1785, took effect,) and the 1st of October, 1793; the distribution during that interval being regulated by the acts of 1785, c. 61. and c. 60. *ib.*
3. Neither was the mother, or her issue, as above mentioned, excluded, where the property was derived, not immediately, but by intervening succession from the father, *ib.*
4. The profits of the estate of an infant dying intestate, (including the increase of slaves,) accruing to such infant in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person or persons, inheriting such estate generally, *ib.*
5. It is not necessary for a patentee of waste and unappropriated land, to make a personal entry thereon, to enable him to maintain ejectment; for the patent *ipso facto* confers *seisin*. *Clay v. White,* 162
3. Such *seisin* may be transferred and continued by deed of bargain and sale, or by devise: but a person, whose *seisin* is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment, *ib.*
4. The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the Jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part, with so much precision as that possession thereof may with certainty be delivered; a *venire de novo* ought to be awarded, *ib.*
5. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. *Hunter v. Fairfax's Devisee,* 218
6. A defendant in ejectment is protected by 20 years' possession before the action brought; but the 5 years and 174 days, excluded by the act of Assembly, are not to be counted in his favour. *Clay v. Ransome,* 454
7. If, therefore, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 174 days, a *venire de novo* ought to be awarded, *ib.*

### DOWER.

1. It seems, that a joint suit in Chancery may be maintained in behalf of a widow, and heirs or devisees, to recover land in which the widow has a right to dower, on a bill stating a case, in other respects, proper for a Court of Law. See note to p. 554.
2. In such case, it seems, the jurisdiction of the Court of Equity will be sustained, although the bill do not specially claim dower, or pray that it may be assigned, but merely a decree for the land, concluding with a prayer for general relief. The Court, having jurisdiction as to the right of dower, will entertain it for the whole subject in controversy; and, after decreeing the land to the plaintiff, will go on to decree assignment of dower to the widow, partition among the other plaintiffs, and rents and profits against the defendants, *ib.*

### DUELLING.

1. An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 3d section of the act to suppress duelling. *Leigh's case,* 468

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### EDUCATION AND MAINTENANCE.

1. See GUARDIAN AND WARD, No. 3. *Hooper and Wife v. Royster and Wife,* 119
2. See LEGATEES, No. 4. *Fitzgerald, Ex'r of Jones, v. Jones,* 150

### EJECTMENT.

1. An illegal and void patent is not to be received as evidence of title on the general issue in ejectment. *Alexander v. Greenup,* 154

2. It is not necessary for a patentee of waste and unappropriated land, to make a personal entry thereon, to enable him to maintain ejectment; for the patent *ipso facto* confers *seisin*. *Clay v. White,* 162
3. Such *seisin* may be transferred and continued by deed of bargain and sale, or by devise: but a person, whose *seisin* is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment, *ib.*
4. The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the Jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part, with so much precision as that possession thereof may with certainty be delivered; a *venire de novo* ought to be awarded, *ib.*
5. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. *Hunter v. Fairfax's Devisee,* 218
6. A defendant in ejectment is protected by 20 years' possession before the action brought; but the 5 years and 174 days, excluded by the act of Assembly, are not to be counted in his favour. *Clay v. Ransome,* 454
7. If, therefore, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 174 days, a *venire de novo* ought to be awarded, *ib.*

### ELECTION.

1. A purchaser, with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value. *Blair v. Owles,* 38
2. In such case, the purchaser or the property, may be made liable, in the first instance, at the election of the plaintiff, *ib.*
3. If a prisoner depart from the prison rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond for keeping the rules, has his election, to bring suit upon it, or to sue the sheriff. *Meredith's Adm'r v. Duval,* 76
4. See CONTRACT, No. 5. *Chichester's Ex'r v. Vass's Adm'r,* 98
5. PENALTY, No. 2.

### ENTRIES AND SURVEYS.

1. See PATENT FOR LAND, No. 1.
2. Escheated lands are not to be granted upon entries and surveys, (as waste and unappropriated lands,) but upon sales by the escheators. *Alexander v. Greenup,* 154
3. *Quere*, whether an entry, for a certain number of acres, "on the waters of Glade Creek, joining the lines of J. H.'s land, and the loca-

tor's own land on W.'s run," be sufficiently certain? *Depew v. Howard and Wife*, 293  
 4. See PURCHASER, No. 9, 10. *Hull v. Cunningham's Ex'r*, 330

## ENTRY.

1. It is not necessary for a patentee of waste and unappropriated land to make a personal entry thereon, to enable him to maintain ejectment. *Clay v. White*, 162
2. A person, whose *seisin* is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment, *ib.*

## EQUITY.

1. A purchaser with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value. *Blair v. Orles*, 38
2. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff, *ib.*
3. In a suit in equity, by the claimant of an encumbrance, against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party, *ib.*
4. *Quere*, whether a security is exonerated by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution, by an agreement to which the security was not a party? and if he be exonerated, whether it is at law, or in equity? *Ward v. Johnston*, 45
5. See ANSWER, No. 1. *Chinn v. Heale*, 63
6. See CHANCERY, No. 4. *ib.*
7. In cases where it is proper and necessary to go into equity for a discovery, the court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law. *Chichester's Ex'r v. Vass's Adm'r*, 98
8. See EVIDENCE, No. 7 and 8. *Hooper and Wife v. Royster and Wife*, 119
9. See APPEAL, No. 1. *ib.*
10. See CHANCERY, No. 9. *ib.*
11. In what case interest ought to be charged against an executor from the date of the decree only. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
12. See LEGATEES, No. 4. *ib.*
13. On a settlement of accounts in a Court of Equity, a decree will be rendered against a plaintiff for a balance of account appearing due to a defendant, *ib.*
14. Prior to the 1st of May, 1804, the Courts of Chancery, on debts not bearing interest in erms, could not grant interest subsequent to the date of the decree. *Dillard v. Tomlinson, &c.*, 183
15. In cases in which the regular remedy is by caveat, a Court of Equity may entertain jurisdiction, under circumstances which render its

interposition just and proper; but such circumstances must be made to appear to the satisfaction of the Court. *Depew v. Howard and Wife*, 293

16. A legal title to land ought not to be disturbed in favour of a party not having a superior right in equity to the identical land in question, *ib.*
17. See CONTRACT, No. 8. *Lewis v. Madisons*, 303
18. In a suit in Chancery to recover a tract of land against a vendee, on the ground that the vendor had previously agreed to convey the same land in a certain event, to the plaintiff, it seems, that the vendor, or his legal representatives, ought to be parties, *ib.*
19. See PURCHASER, No. 9, 10, 11, 12. *Hull v. Cunningham's Ex'r*, 330. 336. 338
20. See DECREE, No. 8, 9. *Templeman v. Steptoe*, 339
21. See ANSWER, No. 2, 3. *Payne v. Coles*, 373
22. The aid of a Court of Equity ought not to be afforded to set up a marriage promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage, *ib.*
23. *Quere*, whether a Court of Equity ought, under any circumstances, to assist, to the prejudice of a posthumous child, the claim of devisees under a will (made before the 1st of January, 1787,) by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy? *ib.*
24. If land be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser; it seems that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may be cancelled, and a release, or reconveyance of the land decreed. *Yancey v. Hopkins*, 419
25. See INFANT, No. 9. *ib.*
26. A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshalling assets, against devisees of the landed property, until he has fully prosecuted his claim at law, against the executor and his securities. *Mason's Devisees v. Peter's Adm'r*, 437
27. A decree against devisees, holding by several and distinct devises, ought not to be joint, but *pro rata*, *ib.*
28. *Quere*, whether, and under what circumstances, a Court of Equity can decree a sale of land descended or devised, (without any specific lien, or any charge, either general or special, by a conveyance or will of the ancestor or devisor,) to satisfy a bond, or a simple contract creditor, claiming on the principle of marshalling assets? Especially, can such decree be made, in any such case, where the rents and profits of the land are sufficient to keep down the interest accruing on the debt? *ib.*
29. On a bill of injunction to a judgment at law, if it appear, on the final hearing, that the judgment ought not to be enjoined, and that the plaintiff in equity has had credit for a sum to which he is not entitled, the Court should not only dissolve the injunction, and dismiss the bill, but should moreover decree that the

- plaintiff pay that sum to the defendant. *Told 2.*  
*v. Bowyer,* 447
30. During the pendency of a suit in Chancery, a settlement of accounts between the parties having been made, and reported to the Court; but, afterwards, by mutual consent, a new order of reference being made; the commissioner was not precluded from examining the accounts generally, and correcting any error therein; especially, as it appeared that the party who was benefited by such error, had torn his own signature, and that of the other party, from the settlement; *ib.*
31. See MORTGAGE, No 1. *Green v. Price,* 449
32. See PURCHASE, No. 1. *Day v. Murdoch,* 460
33. See APPEAL, No. 5, 6. *ib.*
34. See INJUNCTION, No. 2. *Humphrey's Adm'r v. McClenachan's Adm'r and Heirs,* 493
35. See VENDOR AND VENDEE, No. 12, 13. Same case, p. 500
36. See DEBTOR, No. 3. *Dangerfield v. Rootes,* 529
37. Although the assignee of a bond, with, or without notice, takes it subject to all the equity of the obligor, yet such equity must be clearly and manifestly established by proof, before it shall affect an assignee without notice; especially, if the obligor, after the assignment, promise payment of the full amount of the bond to the assignee. *Mayo v. Giles's Adm'r,* 533
38. See DOWER, No. 1, 2. *Note to p. 554. and 555*
39. Under what circumstances, a deed obtained from a man of weak understanding (though not an idiot or lunatic) may be set aside in equity. *Whitehorn and Wife v. Hines and others,* 557
40. FRAUD, it seems, may be presumed in equity, from strong circumstances; such as gross inadequacy of consideration; breach of trust and confidence; undue influence exerted; (especially, over a young and weak person by a near relation;) over diligence and assiduity in guarding against objections, and the like, *ib.*
41. It seems, that a bona fide purchaser, without notice of fraud, having received a deed from two persons, (one of whom fraudulently induced the other to join therein,) is not responsible in equity; but the loss ought to fall on the fraudulent vendor, *ib.*  
 But *quere*, whether this should be the rule, in case the estate of the fraudulent vendor were not sufficient to make good the loss? *ib.*
42. In such case, the circumstance that the person defrauded was of weak understanding, but not an idiot or lunatic, is not sufficient to affect the right of the bona fide purchaser, *ib.*
43. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein; without making such person a party to the suit. *Moon v. Campbell,* 604
44. Where two defendants have appeared and pleaded, an entry in the record "that the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. *Word v. Johnston,* 45
45. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other, *ib.*
46. In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the Court, in reversing the judgment, ought to have given the security leave to plead *passe darrein continuance*, all the proceedings having been brought by a writ of *superedeas*, *ib.*
47. Several judgments and orders, relating to each others, may be brought up by one writ of *superedeas*: provided the whole be sufficiently described, as intended to be comprehended therein, *ib.*
48. What degree of uncertainty and inaccuracy of language is sufficient to set aside the finding of a jury in a mill case. *Eppes v. Cralle,* 258
49. On a petition for leave to add to the height of a mill dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the jury to assess such other damages, accruing from the dam already erected, as were not contemplated by the original jury, *ib.*
50. But an error in this respect should be regarded as surplusage; (the petition for the writ of *ad quod damnum* having prayed only for such inquiry as the law authorizes,) if the jury assessed such erroneous damages separately, and the Court did not direct the same to be paid, but only the damages properly assessed, *ib.*
51. Upon an appeal from a decree in Chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal. *Day v. Murdoch,* 460
52. GENERAL RULE of the Court of Appeals as to the correction of errors operating to the injury of the appellee or defendant in error, *ib. in note.*
53. If a Court give a right judgment, for a wrong reason, it ought, nevertheless, to be affirmed. *Newell v. Wood,* 555
54. See EXECUTION, No. 13, 14. *Glascock's Adm'r v. Dawson,* 605

## ERROR.

1. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence. *Harrison v. Brock,* 52

## ERROR, WRIT OF.

See ERROR.

## ESCAPE.

1. In an action against the sheriff for an escape, a

verdict, in general terms, for the plaintiff, is not sufficient to authorize a judgment; notwithstanding the charge in the declaration be, that the sheriff took a defective prison-bonds bond, and thereupon voluntarily permitted the prisoner to escape; and issue be joined on the plea of *not guilty*. An express finding by the Jury, according to the act of 1792 concerning escapes, is absolutely necessary. *Hose v. Tobbs and Wife*, 501

### ESCHEAT.

1. A patent from the Commonwealth, containing a recital "that the land was escheated from a certain I. M., deceased;" and granting the same, "by virtue of an entry made in the office of the late Lord Proprietor of the *North-ern Neck*, and in consideration of the ancient composition of 12 5s. sterling paid by the grantee into the treasury;" is illegal and void, and not to be received as evidence of title on the general issue in ejectment. *Alexander v. Greenup*, 134
2. The Commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office, and then not (as waste and unappropriated lands) upon entries and surveys; but upon sales by the escheators, *ib.*
3. Under the Act of *May* session, 1779, "concerning escheats and forfeitures from *British* subjects," lands held by the factor of a *British* mercantile company, on their behalf, by virtue of such a title as was equitable only, escheated to the Commonwealth; subject to the payment of so much of the purchase-money remaining due, as did not exceed the *net* amount for which the land was sold by the escheator, reduced to present current money, according to the 3d section of that act. See *PURCHASE*, No. 1. *Day v. Murdoch*, 460

### ESTATE.

#### See REAL ESTATE.

### EVICITION.

1. In case of eviction, after a conveyance made with warranty, the value of the land lost, as at the time of the eviction, gives the rule by which the vendee is to be remunerated; but, when the contract is executory, a Court of Equity will adjust it, upon principles of equity according to the circumstances. *Humphrey's Adm'r v. Mc'Clenachan's Adm'r and Heirs*, 500

### EVIDENCE.

1. A party tendering a demurrer to evidence, if it be parol and contradictory, cannot, after exhibiting the testimony on his side, compel the other party to join in demurrer. *Harrison v. Brock*, 22
2. The Jury and not the Court are judges of the credibility of witnesses, *ib.*
3. An award, made *pendente lite*, cannot be given in evidence upon the plea of *non assumpti*, *ib.*
4. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence. *Harrison v. Brock*, 22
5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by assisting him his agent, makes him a competent witness to prove the notice. *Blair v. Owen*, 38
6. In an action on a prison-bonds bond, the plaintiff is only required to show a departure from the rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law. *Meredith's Adm'r v. Duval*, 76
7. In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court;" and the answer having admitted that such suit was brought, and such a decree as stated in the bill, existed; the Court of Appeals will award a writ of *conscripti* for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer. *Hooper and Wife v. Register and Wife*, 119
8. An administrator, to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree, *ib.*
9. Proof of the parol declarations of a guardian that she did not intend to charge her ward for board is admissible to repel a charge, for board in her life-time, exhibited by her representatives after her death, *ib.*
10. A patent appearing on its face to be illegal and void is not to be received as evidence of title on the general issue in ejectment. *Alexander v. Greenup*, 134
11. Under peculiar circumstances, it was held unreasonable rigorous to exact vouchers for many items in an executor's account which appeared probably just, though not supported by proof. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
12. By virtue of the 34th section of the District Court law of 1792, the copies therein allowed are good evidence in suits brought since that act took effect. *Arnold's Adm'r v. Trumble*, 175
13. Parol evidence is admissible to prove that a *f. fa.* was levied, though no return was made upon it. *Bullitt's Ex'r v. Winstone*, 269
14. On a joint plea of "*not guilty*," in trespass *vi et armis*, against two defendants, for breaking the plaintiff's close and beating his slaves, the defendants ought not to be permitted to give in evidence, by way of mitigation of damages, a license from the plaintiff, to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly; the battery being committed

by the other defendant; and no proof appearing that the slaves who were beaten had acted improperly. *Brown and Belesau v. May*, 288

15. Illegal, or improper evidence ought never to be confided to the Jury, however unimportant it may be to the cause, *ib.*
16. A record of one suit cannot be read as evidence in another, unless both the parties, or those under whom they claim, were parties to both suits; it being a rule that a document cannot be used against a party who could not avail himself of it, in case it made in his favour. *Paynes v. Coles*, 373
17. A record of one suit cannot be read as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both; another plaintiff, and the person under whom both the said plaintiffs jointly claim, not having been parties to such former suit. *Chapman v. Chapman*, 398
18. In such case, the circumstance that the "writings and evidences" in the former suit were read at the hearing of the latter, without any exception taken at that time appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the Appellate Court; the defendant in his answer having objected to the admission of the verdict and other proceedings in the former suit, but offered to agree that the depositions only might be read; to which offer no assent appeared on the part of the plaintiff, *ib.*
19. An answer in Chancery (though, in form, responsive to a question put in the bill) is not evidence, where it asserts a right, affirmatively in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill. *Paynes v. Coles*, 373
20. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer, without proof. Neither is this rule to be varied by the circumstance that infants are interested, *ib.*
21. Under what circumstances a protest before a notary public by the master of a vessel is no evidence. *Murine Insurance Company of Alexandria v. Stras*, 408
22. A judgment against the executor is no evidence against the heirs or devisees of the real estate. *Mason's Devisees v. Peter's Adm'rs*, 437
23. What is sufficient evidence to establish a nuncupative will. See WILLS, No. 3. *Mason v. Dunsman*, 456
24. Parol evidence, of subsequent declarations and acknowledgments by the parties, is not sufficient to support an agreement, between a purchaser of land and a third person, that such third person should be admitted as a partner in the purchase. *Henderson v. Hudson*, 510
25. The proof must be clear and manifest to affect an assignee by an equity of which he had no notice; especially, if the obligor, after the as-

signment, promise payment of the full amount of the bond to the assignee. *Mays v. Giles's Adm'rs*, 533

26. What circumstances are evidence of FRAUD in a Court of Equity. See FRAUD, No. 3, 4. *Harvey and Wife v. Pecke*, 518. and *Whitehorn and Wife v. Hines and others*, 557
27. A vendor of land, according to certain lines, must be presumed interested, and therefore incompetent, as a witness, to establish those lines; unless it appear that he did not warrant the title. *Moon v. Campbell*, 600

## EXAMINATION, (PRIVY.)

1. See DEED, No. 10. *Harvey and Wife v. Pecke*, 518

## EXECUTION.

1. An execution against the goods of a decedent in the hands of his executor or administrator, with a return of *nulla bona*, is not sufficient to ground an action on the administration bond. *Gordon's Adm'rs v. The Justices of Frederick*, 1
2. If a judgment be confessed by a principal, by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the security (in case of further proceedings against him) ought to be permitted to plead such matter *pais darrein continuance*. *Ward v. Johnston*, 45
3. *Quere*, whether such plea, if demurred to, would be good in law to bar the plaintiff's claim as against the security? *ib.*
4. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor. *Atwell's Adm'rs v. Towles*, 175
5. A writ of *fiert facias* may be levied, without touching or removing the property; provided it be in the immediate power of the sheriff, and admitted by him to have been taken to satisfy the debt. *Bullitt's Ex'rs v. Winston*, 269
6. The sheriff's permitting the property to remain in the possession of a third person, or of the defendant, under a verbal engagement to produce it on the day of sale, does not prevent the *fi. fa.* from having been levied in contemplation of law; the sheriff being responsible to the plaintiff, in such case, if the property be not produced, *ib.*
7. Parol evidence is admissible to prove that a *fi. fa.* was levied, though no return was made upon it, *ib.*
8. A sheriff may be permitted, by order of Court, to make a return upon an execution, or to amend it, according to the truth of the case, at any time after the return day, *ib.*
9. A plaintiff, by directing the sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the possession of the principal defendant, or his securities, releases the securities altogether from that or any subsequent

- execution; such direction being given without their concurrence. *Bullitt's Ex'rs v. Winstons*, 269
10. In such case, the plaintiff's adding to the direction the words "holding the property subject to the said execution," cannot prevent the release from operating. *ib.*
11. An appeal from, or *supercedens* to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only, *ib.*
12. A defendant, against whom an execution issued, may move to quash it, though not levied on his property, but on that of a co-defendant only. Note to p. 284
13. A writ of *feri facias* against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and, as to other damages and costs, of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a forthcoming bond taken," &c. The bond being given by the administratrix, *ex nomine*, but expressing that the *f. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *f. fa.*, and therefore quashed. *Glascock's Adm'x v. Dawson*, 605
14. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken, *ib.*

## EXECUTORS AND ADMINISTRATORS.

1. It is necessary, after a judgment against an executor or administrator, as such, to establish a *devastavit*, by means of a second suit, before an action can be maintained on the administration bond. *Gordon's Adm'rs v. The Justices of Frederick*, 1
2. An answer filed in the name of one of three executors (the decree being in favour of the plaintiff) is not to be taken as their joint answer; notwithstanding the clerk in the transcript of the record says that they appeared by counsel, and filed their answer, and no steps were taken to compel a further answer from them. *Chinn v. Heale*, 63
3. A husband surviving his wife (or, in case of his death afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate. *Chichester's Ex'x v. Fass's Adm'r*, 98
4. An administrator to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the award, to prove the payment of the money to her guardian; though the latter was no party to the decree. *Hooper and Wife v. Royster and Wife*, 119
5. Proof of the parol declarations of a guardian, that she did not intend to charge her ward for board, is admissible to repel a charge, for board in her life-time, exhibited by her executor or administrator after her death. *Hooper and Wife v. Royster and Wife*, 119
6. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate delivered over to the legatees or distributees, *ib.*
7. An executor having delivered up the estate generally and the management thereof to one of the residuary legatees, for his benefit and that of his co-legatee; nine years and ten months having afterwards elapsed before he was summoned to render an account; the greater part of his executorship having moreover been during the revolutionary war; and the settlement taking place after his death; it was held unreasonable rigour to exact vouchers for many items in his account which appeared probably just, though not supported by proof. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
8. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree; neither in such case, ought interest to be allowed him on payments to the legatees before the decree; though made in bonds which carried interest, *ib.*
9. Under circumstances a commission of 7 1-2 per cent. may be allowed an executor on all his receipts and disbursements; the real and personal estate having, in obedience to the directions of the will, been kept together and managed by him, *ib.*
10. An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due; (no proof appearing that it was then collected, or that interest from that day was received upon it;) but a reasonable time to collect and apply the money should be allowed before the commencement of interest. *Dillard v. The Tinsion, &c.*, 185
11. In such case, no interest ought to be charged where the right to the slaves was in dispute, and it was doubtful to whom the money, when collected, should be paid; no proof appearing that the executor or administrator received any interest, or made any profit, *ib.*
12. A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshalling assets, against devisees of the landed property until he has fully prosecuted his claim at law, against the executor and his securities. *Mason's Devisees v. Peter's Adm'r*, 45
13. A judgment by default, against an executor, is *prima facie* admission of assets, *ib.*
14. A judgment against the executor is no evidence

- against the heirs or devisees of the real estate. 2. *Mason's Devisees v. Peter's Adm'r*, 437
15. What decree may be made on a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, claiming compensation for a deficiency, credits for payments, and a conveyance. *Humphrey's Adm'r v. Mc'Clenachan's Adm'r and Heirs*, 493
16. See EXECUTION, No. 13. *Glascock's Adm'r v. Dawson*, 605
- The statute, "to prevent frauds and perjuries," applies to an agreement, between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments of the parties. *Henderson v. Hudson*, 510
3. What are badges of fraud in obtaining a deed. *Harvey and Wife v. Pecks*, 518
4. FRAUD, it seems, may be presumed in equity from strong circumstances; such as gross inadequacy of consideration; breach of trust and confidence; undue influence exerted; (especially, over a young and weak person by a near relation;) overdiligence and assiduity in guarding against objections; and the like. *Whitehorn and Wife v. Hines and others*, 557
5. See PURCHASER, No. 20, 21. *ib.*

F

FAIRFAX, (LORD.)

See NORTHERN NECK OF VIRGINIA.

FIERI FACIAS.

See EXECUTION.

FIRE COMPANY.

See MUTUAL ASSURANCE SOCIETY.

FORFEITURE.

1. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance. *Yancey v. Hopkins*, 419
2. See INFANT, No. 9. *ib.*
3. See ESCHEAT, No. 3. PURCHASE, No. 1. *Day v. Murdoch*, 460

FORTHCOMING BOND.

1. A writ of *feri facias* against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and, as to other damages and costs, of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a forthcoming bond taken," &c. The bond being given by the administratrix, *ex nomine*, but expressing that the *f. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *f. fa.* and therefore quashed. *Glascock's Adm'r v. Dawson*, 605
2. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken. *ib.*

FRAUD.

1. A mortgagee, without notice, shall be protected against a prior equitable title; if the person, having such title, either encouraged him to take the mortgage, or, knowing of his intention to take it, stood by, and made no objection. *Green v. Price*, 449
- VOL. I. 4 N

G

GRANT.

See PATENT FOR LAND.

GUARDIAN AND WARD.

1. An administrator, to whom a credit, for a sum of money paid by him to the guardian of one of the distributees, has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree. *Hooper and Wife v. Royster and Wife*, 119
2. Proof of the parol declarations of a guardian that she did not intend to charge her ward for board is admissible to repel a charge, for board in her life-time, exhibited by her representatives after her death. But, in such case, she ought not to be charged with interest on a sum of money received for the ward, unless such interest would exceed the amount of a reasonable compensation for board. *ib.*
3. A guardian may be allowed for moneys paid and advanced, for the clothes, schooling and other necessary expenses of the ward, out of the principal of such ward's estate; if it appear that, from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of such guardian; otherwise, such allowance ought to be made out of the profits only. *ib.*
4. Money received, by a guardian for a ward, during the paper money times, ought to be reduced by the scale of depreciation; to be applied as on the last day of the year in which it was received. *ib.*
5. A reasonable time ought to be allowed a guardian to put the money of a ward out at interest: and, in this case, six months were considered as such reasonable time. *ib.*
6. If money was received, by a guardian for a ward, within six months previous to the 1st of January, 1777, (when the scale of depreciation commenced,) it should be reduced according



to the sale, as at the end of six months from the time when received. *Hooper and Wife v. Royster and Wife*, 119

## H

## HEIRS.

1. A judgment against the executor is no evidence against the heirs or devisees of the real estate. *Mason's Devises v. Peter's Adm'r*, 437
2. What decree may be made on a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, claiming compensation for a deficiency, credits for payments and a conveyance. *Humphrey's Adm'r v. Mc Clenachan's Adm'r and Heirs*, 493

## HIRE.

1. See SLAVES, No. 1, 2.
2. See INTEREST, No. 10.

## HUSBAND AND WIFE.

1. If A. promise B. that if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters as fast as it is in his power with convenience," and the marriage be afterwards had with his consent; the promise is sufficiently certain and obligatory. *Chichester's Ex'x v. Vass's Adm'r*, 98
2. In such case, A. has not his life-time to perform it in; but, in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to B. and wife, equal to the largest made to his other daughters, *ib.*
3. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and, if he survive the wife, may sue in his own right to recover damages for a breach, *ib.*
4. A husband, surviving his wife, (or, in case of his death afterwards, his executor or administrator,) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate, *ib.*
5. The aid of a Court of Equity ought not to be afforded to set up a marriage-promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage. *Paynes v. Coles*, 373
6. See RELIEF, No. 3. *ib.*
7. A deed from a husband and wife, without her privy examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance. *Harvey and Wife v. Pecke*, 518

## I

## IDIOT.

1. Under what circumstances, a deed, obtained from a man of weak understanding, (though not an idiot or lunatic,) may be set aside in equity. *Whitchorn and Wife v. Hines and others*, 557
2. See EQUITY, No. 41, 42. *ib.*

## IMBECILITY OF UNDERSTANDING.

See IDIOT, 4

## INADEQUACY OF CONSIDERATION.

See CONSIDERATION, 6

## INCREASE.

1. See INFANT, No. 4.

## INCUMBRANCE.

1. Notice of a *lien* or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance. *Blair v. Owles*, 38
2. A purchaser with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value, *ib.*
3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff, *ib.*
4. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party, *ib.*
5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice, *ib.*

## INFANT.

1. It is now settled, that the mother of an infant who died intestate, between the first of October, 1793, (when the suspended acts of 1792 took effect,) and the 22d of January, 1802, (when the act, "concerning the distribution of unbequeathed personal estate," was passed,) or any of her issue, by a person other than the father, was not entitled to any part of such infant's personal estate derived immediately from the father. *Dillard v. Tomlinson, &c.* 183
2. But the law was otherwise relative to the property of an infant who died intestate, between the 1st of January, 1797, (when the acts of

- 1785 took effect, and the 1st of October, 1795; the distribution during that interval, being regulated by the acts of 1785, c. 61. and c. 60. *Dilliard v. Tomlinson, &c.* 183
3. Neither was the mother, or her issue, as above mentioned, excluded, where the property was derived, not immediately, but by intervening succession, from the father, *ib.*
  4. The profits of the estate of an infant dying intestate, (including the increase of slaves,) accruing to such infant in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person, or persons, inheriting such estate generally, *ib.*
  5. Where an infant, having title to a real estate of inheritance derived by purchase or descent immediately from the father, dies without issue, and with no brother or sister, or descendant of either; the father being dead, but the mother living; the right of inheritance is not in abeyance, but goes in parcenary to the brothers and sisters of the father, or their lineal descendants: and, *vice versa*, such estate being derived immediately from the mother; and she being dead, but the father living; it goes in parcenary to her brothers and sisters, or their lineal descendants. *Templeman v. Steptoe,* 339
  6. The law was the same, as to personal estate, between the 1st of October, 1793, and the 22d of January, 1802, *ib.*
  7. See ISSUE OUT OF CHANCERY, No. 1. *Paynes v. Coles,* 373
  8. See EQUITY, No. 23. *ib.*
  9. The land of an infant being, by mistake, listed by the Commissioner of revenue as the property of another person, and sold as such for taxes, in December, 1786; being bought by the deputy sheriff who sold it; conveyed to him by the high sheriff in February, 1795; and afterwards sold again by the deputy sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age. *Yancey v. Hopkins,* 419

#### INHERITANCE.

1. See INFANT, No. 4. *Dilliard v. Tomlinson, &c.* 183
2. See INFANT, No. 5, 6. *Templeman v. Steptoe,* 339

#### INJUNCTION.

1. On a bill of injunction to a judgment at law, if it appear, on the final hearing, that the judgment ought not to be enjoined, and that the plaintiff in equity has had credit for a sum to which he is not entitled; the Court should not only dissolve the injunction and dismiss the bill, but should moreover decree that the plaintiff pay that sum to the defendant. *Todd v. Bowyer,* 447
2. On a bill of injunction exhibited by the admi-

nistrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, (in whom the legal title remains,) claiming compensation for a deficiency, credits for payments and a conveyance; the Court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees to be by them conveyed to the heirs of the purchaser, (though not parties to the suit,) if the balance of the purchase-money be paid on or before a certain day; and, if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs. *Humphrey's Adm'r v. McClenachan's Adm'r and Heirs,* 493

#### INQUEST OF OFFICE.

1. The Commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office. *Alexander v. Greenup,* 134
2. *Quare*, were the several acts of assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the Northern Neck, equivalent to an inquest of office, and sufficient to authorize grants of the said lands by the commonwealth? *Hunter v. Fairfax's Devisee,* 218

#### INQUISITION.

See MILLS.

#### INSOLVENCY.

1. The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees: but the sheriff cannot legally discharge him, unless he be actually insolvent, and, being so, the plaintiff, having notice thereof, refuse to pay his fees, or to give bond for the payment thereof. *Meredith's Adm'r v. Duval,* 76

#### INSURANCE.

1. See MARINE INSURANCE, No. 1, 2, 3.
2. See MUTUAL ASSURANCE SOCIETY, No. 1, 2.

#### INTENTION.

1. See WILLS, No. 4, 5. *Wyatt v. Sadler's Heirs,* 537
2. See WILLS, No. 6, 7. *Johnson and others v. Johnson's Widow and Heirs,* 549

#### INTEREST.

1. Where it appears that a guardian boarded her ward in her own house, and intended to make no charge for it, she ought not to be charged with interest on a sum of money received for the ward, unless such interest would exceed the amount of a reasonable compensation.

- for board. *Hooper and Wife v. Royster and Wife*, 119
2. A reasonable time ought to be allowed a guardian to put the money of a ward out at interest; and, in this case, six months were considered as such reasonable time, *ib.*
  3. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree: neither, in such case, ought interest to be allowed him on payments to the legatees before the decree; though made in bonds which carried interest. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
  4. See **BOND**, No. 13. *Atwell's Adm'r v. Towles*, 175
  5. See **PENALTY**, No. 2. *ib.*
  6. Interest on costs could not properly be allowed, under the act of 1803, § *Rev. Code*, p. 30. c. 29. s. 5. So decided in *M'Rou v. Brown*, in note to p. 179.
  7. An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due; (no proof appearing that it was then collected, or that interest from that day was received upon it;) but a reasonable time to collect and apply the money, should be allowed before the commencement of interest. *Dilliard v. Tomlinson, &c.*, 183
  8. In such case, no interest ought to be charged where the right to the slaves was in dispute, and it was doubtful to whom the money, when collected, should be paid, no proof appearing that the executor or administrator received any interest, or made any profit, *ib.*
  9. Prior to the 1st of May, 1804, (when the act, "concerning the proceedings in the Courts of Chancery, and for other purposes," took effect; see § *Rev. Code*, p. 30.) the Courts of Chancery, on debts not bearing interest in terms, could not grant interest subsequent to the date of the decree, *ib.*
  10. Interest on the hire of slaves disallowed as in *Dilliard v. Tomlinson*, ante, p. 183. *Whitehorn v. Hines and Wife*, 557

## INTERLOCUTORY DECREE.

1. See **DECREE**, No. 2. *Hooper and Wife v. Royster and Wife*, 119

## INTESTATES' ESTATES.

1. See **INFANT**, No. 1, 2, 3, 4. *Dilliard v. Tomlinson, &c.*, 183
2. See **INFANT**, No. 5, 6. *Templeman v. Stephen*, 339

## ISSUE OUT OF CHANCERY.

1. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but

augmented in the answer, without proof. Neither is this rule to be varied by the circumstance that infants are interested. *Paynes v. Coles*, 373

## ISSUE OF MARRIAGE.

1. The aid of a Court of Equity ought not to be afforded to set up a marriage promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage. *Paynes v. Coles*, 373
2. See **RELIEF**, No. 8. *ib.*

J

## JEOFAILS.

1. A judgment at rules in the clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term; but, if it be entered as at rules only, it is merely a clerical misprision, and therefore amendable. *Digger's Ex'r v. Dunn's Ex'r*, 56
2. In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial, *ib.*
3. See **DECLARATION**, No. 4.
4. See **EJECTMENT**, No. 4.
5. What defects in a declaration for covenant broken are not cured by the act of jeofails. *Austin's Adm'r v. Whitlock's Ex'r*, 487

## JUDGMENT.

1. A judgment against an executor or administrator as such, with an execution, and return of *nulla bona*, are not sufficient to authorize an action on the administration bond; but a *de-vastavit* must first be established by a second suit. *Gordon's Adm'r v. The Justices of Frederick*, 1
2. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence. *Harrison v. Brock*, 82
3. Where two defendants have appeared and pleaded, an entry in the record "that the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. *Ward v. Johnston*, 45
4. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other, *ib.*
5. In such case, the plaintiff having, after the judgment, moved for permission to proceed against

- the security; and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the Court, in reversing the judgment, ought to have given the security leave to plead *puis darrein continuance*; all the proceedings having been brought up by a writ of *superseatas*. *Ward v. Johnston*, 45
6. Several judgments and orders, relating to each other, may be brought up by one writ of *superseatas*; provided the whole be sufficiently described, as intended to be comprehended therein, *ib.*
7. *Quare*, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party? *ib.*
8. A judgment at rules in the clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term; but, if it be entered as at rules only, it is merely a clerical misprision, and therefore amendable. *Digges's Ex'r v. Dunn's Ex'r*, 56
9. In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial, *ib.*
10. See *BOND*, No. 13.
11. In an action of debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest; and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty. *Atwell's Adm'r's v. Towles*, 175
12. A plea in abatement ought not to be received to set aside an office judgment; unless it be of matter which arose *puis darrein continuance*. *Bradley v. Welch*, 284
13. See *ASSETS*, No. 1. *Mason's Devisees v. Peter's Adm'r's*, 437
14. A judgment by default, against an executor, is *prima facie* admission of assets, *ib.*
15. A judgment against the executor is no evidence against the heirs or devisees of the real estate, *ib.*
16. GENERAL RULE of the Court of Appeals, relative to correction of errors in judgments and decrees. *Day v. Murdoch*, 460. *in note*.
17. If, in a suit upon a prison-bonds bond, a Court of competent jurisdiction, adjudge the bond void; the plaintiff may sue the sheriff without appealing from the judgment, though erroneous. *Moore v. Tebbel and Wife*, 501
18. In such case the sheriff, though not a party to the suit on the bond, is bound by the judgment, unless he can prove it was obtained by collusion, *ib.*
19. See *ESCAPE*, No. 1. *ib.*
20. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law. *Newell v. Wood*, 555
21. If a Court give a right judgment for a wrong

reason, it ought, nevertheless, to be affirmed. *Newell v. Wood*, 555

22. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken. *Glascock's Adm'r v. Dawson*, 605

## JURISDICTION.

1. In cases where it is proper and necessary to go into equity for a discovery, the Court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been at Law. *Chichester's Ex'r v. Pass's Adm'r*, 98
2. Neither consent, nor long acquiescence of parties can give the Court of Appeals jurisdiction. *Clarke v. Conn*, 160
3. In cases in which the regular remedy is by *caveat*, a Court of Equity may entertain jurisdiction, under circumstances which render its interposition just and proper; but such circumstances must be made to appear to the satisfaction of the Court. *Depew v. Howard and Wife*, 293
4. In what case a Court of Equity, having jurisdiction as to part of a subject in controversy, will entertain it for the whole. See *DOWER*, No. 1, 2. *note* to p. 554.
5. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law. *Newell v. Wood*, 555

## JURY.

1. The Jury and not the Court, are judges of the credibility of witnesses. *Harrison v. Brock*, 22
2. *Illegal*, or *improper* evidence ought never to be confided to the Jury; however unimportant it may be to the cause. *Brown and Botsedts v. May*, 288

## L

## LANDLORD AND TENANT.

1. A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond; unless it appear that such bond was taken by a sheriff, or other officer legally authorized to make distress, and to sell the distrained effects. *Smiths v. Ambler*, 596
2. A landlord, in person, or by a private agent, may levy a distress; but cannot sell the distrained effects, which, in such case, are only to be held as a pledge, to compel the tenant to pay the rent, *ib.*

## LANDS.

1. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a

- deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable. *Chinn v. Heale*, 63
2. Where a plaintiff sues in chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law, *ib.*
  3. A patent from the commonwealth, containing a recital "that the land was escheated from a certain J. M. deceased;" and granting the same, "by virtue of an entry made in the office of the late lord proprietor of the Northern Neck; and in consideration of the ancient composition of 11. 5s. sterling paid by the grantee into the treasury;" is illegal and void, and not to be received as evidence of title on the general issue in ejectment. *Alexander v. Greenup*, 134
  4. The commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office, and then not (as waste and unappropriated lands) upon entries and surveys; but upon sales by the escheators, *ib.*
  5. A patent may be declared void, for defects apparent on its face; without the necessity of resorting to a *scire facias* to repeal it, *ib.*
  6. *Quere*, whether, and from what Court, a *scire facias* to repeal a patent can issue in Virginia? *ib.*
  7. It is not necessary for a patentee of waste and unappropriated land to make a personal entry thereon, to enable him to maintain ejectment; for the patent *ipso facto* confers seisin. *Clay v. White*, 162
  8. Such seisin may be transferred and continued by deed of bargain and sale, or by devise: but a person, whose seisin is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment, *ib.*
  9. The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part with so much precision as that possession thereof may with certainty be delivered; a *venire de novo* ought to be awarded, *ib.*
  10. By the act of compromise, passed the 10th of December, 1796, the title of *Denny Fairfax*, and of those who claim under him, to such of the lands in the *Northern Neck* as were waste and unappropriated at the time of the death of Lord *Fairfax* was clearly extinguished. *Hunter v. Fairfax's Devisee*, 218
  11. *Quere*, were the several acts of assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the *Northern Neck*, equivalent to an inquest of office, and sufficient to authorize grants of the said lands by the commonwealth, independently of the said act of compromise? *Hunter v. Fairfax's Devisee*, 218
  12. *Quere*, whether, by virtue of the treaty of 1783, persons born in *Great Britain*, and residing there on the 4th of July, 1776, could, without ever thereafter becoming citizens of *Virginia*, or of any one of the *United States of America*, take and hold lands in *Virginia*, by descent, or devise, accruing between that day and the date of the said treaty? *ib.*
  13. See ATTORNEY IN FACT, No. 1, 2, 3. *Betts v. Cradle*, 238
  14. See JURISDICTION, No. 3. *Depeu v. Howard and Wife*, 293
  15. A legal title to land ought not to be disturbed in favour of a party not having a superior right in equity to the identical land in question, *ib.*
  16. *Quere*, whether an entry for a certain number of acres "on the waters of *Glade Creek*, joining the line of *J. H.'s* land, and the locator's own land on *W.'s* run," be sufficiently certain? *ib.*
  17. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a *lien* claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. *Lewis v. Madisons*, 303
  18. See PARTIES, No. 5. *Lewis v. Madisons*, *ib.*
  19. Though land be sold in gross, for so much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency. *Hull v. Cunningham's Ex'r*, 330
  20. But if the purchaser do not (by eviction or otherwise) lose the land he expected to get; but make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for trouble therein, and actual costs of suit, *ib.*
  21. A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken, *ib.* 336
  22. See note to the same case, p. 338
  23. *Assumpsit*, for the use and occupation of land by permission of the plaintiff lies on an implied as well as express promise. *Sutton v. Mandeville*, 407
  24. If lands be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser: it seems that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may

- be cancelled, and a release, or reconveyance of the land decreed. *Yancey v. Hopkins*, 419
35. The land of an infant being, by mistake, listed by the commissioner of revenue as the property of another person, and sold, as such, for taxes, in *December*, 1786; being bought by the deputy sheriff, who sold it; conveyed to him by the high sheriff in *February*, 1795; and afterwards sold again by the deputy sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age, *ib.*
36. See ASSETS, No. 1. *Mason's Devises v. Peter's Adm'r*, 437
37. A judgment against the executor is no evidence against the heirs or devisees of the real estate, *ib.*
38. A decree against devisees holding by several and distinct devises ought not to be joint, but *pro rata*, *ib.*
39. *Quere*, whether, and under what circumstances, a Court of Equity can decree a sale of land descended or devised, to satisfy a bond or simple contract creditor? *ib.*
40. See PURCHASE, No. 1. *Day v. Murdoch*, 460
41. See COVENANT, No. 4. *Austin's Adm'r v. Whitlock's Ex'rs*, 487
42. If, by a sealed instrument, a vendor declare that he has sold to the vendee all his right to certain land warrants, for which the surveyor's receipt has been taken; that, if patents have issued in his name, he will transfer the same by deed; and, if not, desires that they may issue to the vendee; agreeing to pay, or deduct from the purchase-money, all expenses which have accrued; he is bound to make a deduction for a deficiency resulting from a previous contract, by his agent, to allow the locator one third of the land; though such contract was not known to him at the time of his bargain with the vendee, to whom it was equally unknown. *Humphrey's Adm'r v. McClenachan's Adm'r and Heirs*, 493
43. On a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, (in whom the legal title remains,) claiming compensation for a deficiency, credits for payments, and a conveyance, the Court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees, to be by them conveyed to the heirs of the purchaser, (though not parties to the suit,) if the balance of the purchase-money be paid on or before a certain day; and, if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs, *ib.*
44. In case of eviction after a conveyance made with warranty, the value of the lost land, as at the time of the eviction, gives the rule by which the vendee is to be remunerated; but, when the contract is executory, a Court of Equity will adjust it, upon principles of equity according to the circumstances. *Same case*, p. 500
45. In case of a deficiency, the value at the time of the contract gives the rule; of which the purchase-money is the standard, where it does not appear that the actual value was different, *ib.*
46. The statute of frauds applies to an agreement, between a purchaser of land and a third person, that such person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments by the parties. *Henderson v. Hudson*, 510
47. See WILLS, No. 5. *Wyatt v. Sadler's Heirs*, 534
48. A fee-simple estate in lands might pass by a will (even before the act of 1785, c. 62.) without words of perpetuity, or any words equivalent; provided it appeared, from the whole will taken together, that such was the intention of the testator. *Johnson and others v. Johnson's Widow and Heirs*, 549
49. Where an illiterate testator uses the same words in disposing of his real, as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property, *ib.*
50. See DOWER, No. 1, 2. *note to p.* 554, 555
51. See MUTUAL ASSURANCE SOCIETY, No. 1, 2. *Greenhaw v. Barton*, 590
52. See LANDLORD AND TENANT, No. 1, 2. *Smith v. Ambler*, 596
53. A vendor of land according to certain lines must be presumed interested, and therefore incompetent as a witness, to establish those lines; unless it appear that he did not warrant the title. *Mason v. Campbell*, 609

## LAW.

1. The practice of LAW is not an office or place, under the commonwealth. *Leigh's case*, 468
2. See ATTORNEY AT LAW, No. 2. *ib.*

## LEGATEES.

1. In a suit for contribution against legatees or distributees, the executor or administrator when to be a party; and when not. *Hooper and Wife v. Royster and Wife*, 119
2. See EXECUTORS AND ADMINISTRATORS, No. 7.
3. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree: neither, in such case, ought interest to be allowed him on payments to the legatees before the decree; though made in bonds which carried interest. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
4. A wealthy testator having bequeathed pecuniary legacies to three of his daughters, to be paid them, "if the money could be raised by

his estate by the time that either of them should marry, or come of age;" (without saying any thing about their maintenance or education;) it was held that they were entitled (notwithstanding their legacies) to maintenance and education out of the estate; at least while the legacies were not sufficiently productive. *Fitzgerald, Ex'r of Jones, v. Jones,* 150

## LIEN.

1. Notice of a lien or encumbrance on property binds the purchaser if received by him any time before the execution of the conveyance. *Blair v. Owens,* 38
2. A purchaser with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value. *ib.*
3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff, *ib.*
4. In a suit in equity, by the claimant of an encumbrance, against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party, *ib.*
5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever, *ib.*
6. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. *Lewis v. Madison,* 303

## LIMITATION OF TIME.

1. A defendant in ejectment is protected by 30 years' possession before the action brought; but the 5 years and 174 days, excluded by the act of Assembly, are not to be counted in his favour. *Clay v. Runsome,* 454
2. If, therefore, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 30 years' possession, exclusive of the said 5 years and 174 days, a *venire de novo* ought to be awarded, *ib.*

## LOCATION.

1. In what case a vendor is bound to make compensation to the vendee for a deficiency resulting from a previous contract to allow the locator one third of the land. *Humphrey's Adm'r v. McClenachan's Adm'r and Heirs,* 493

## LUNATIC.

See IDIOT.

## M

## MAINTENANCE AND EDUCATION.

1. See GUARDIAN AND WARD, No. 3. *Hooper and Wife v. Royster and Wife,* 119
2. See LEGATEES, No. 4. *Fitzgerald, Ex'r of Jones, v. Jones,* 150

## MARINE INSURANCE.

1. A marine insurance, "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and 't and from thence back to Richmond," must be understood as an insurance "at and from Norfolk to Curacao, in the first place, with liberty of going from Curacao to any other island," &c. *Marine Insurance Company of Alexandria v. Straz,* 408
2. If, therefore, the vessel put into the island of St. Thomas, and thence return to Norfolk, without ever going to Curacao, it is a deviation from the voyage; and there being no proof that such deviation was occasioned by stress of weather, or other unavoidable accident, the person insured is entitled to no return of premium; such being the terms of the policy, *ib.*
3. A protest before a notary public, by the master of the vessel, after his return to Virginia, is no evidence in such case: and, *quære*, would such a protest, made at St. Thomas's, have been any evidence; the person who made it being alive, and no impediment to prevent his deposition from being regularly taken? *ib.*

## MARSHALLING ASSETS.

See ASSETS.

## MARRIAGE.

1. If A. promise B. that, if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters, as fast as it is in his power with convenience; and the marriage be afterwards had with his consent; the promise is sufficiently certain and obligatory. *Chichester's Ex'x v. Vass's Adm'r,* 98
2. In such case, A. has not his life-time to perform it in; but, in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement, to B. and wife, equal to the largest made to his other daughters, *ib.*
3. A promise in the above-mentioned terms entures to the joint benefit of the husband and wife, and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and, if he survives the wife, may sue in his own right to recover damages for a breach, *ib.*

2. A husband, surviving his wife, (or, in case of his death afterwards, his executor or administrator,) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate. *Chichester's Ex'r v. Vase's Adm'r*, 98
5. The aid of a Court of Equity ought not to be afforded to set up a marriage promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage. *Paynes v. Coles*, 373
6. See DEED, No. 10. *Harvey and Wife v. Pecks*, 518

### MAXIMS.

1. It is a rule of evidence that a document cannot be used against a party who could not avail himself of it, in case it made in his favour. See EVIDENCE, No. 16. *Paynes v. Coles*, 373
2. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance. *Yancey v. Hopkins*, 419

### MILLS.

1. What degree of uncertainty and inaccuracy of language is sufficient to set aside the finding of a Jury in a mill case. *Eppes v. Cralle*, 258
2. On a petition for leave to add to the height of a mill-dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the Jury to assess such other damages, accruing from the dam already erected, as were not contemplated by the original Jury. *ib.*
3. But an error in this respect should be regarded as surplusage, (the petition for the writ of *ad quod damnum* having prayed only for such inquiry as the law authorizes,) if the Jury assessed such erroneous damages separately, and the Court did not direct the same to be paid, but only the damages properly assessed. *ib.*
4. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses. *ib.*
5. The finding of a Jury, in a mill case, that "probably the health of certain families who live near the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner. *Mays v. Turner*, 405

### MISTAKE.

1. Under what circumstances an attorney in fact is not responsible for a mistake in having a survey made of lands not belonging to his employer. *Betts v. Cralle*, 238
2. Though land be sold in gross, for so much, be it

more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency. *Hull v. Cunningham's Ex'r*, 330

3. See PURCHASE, No. 10, 11, 12.
4. See EQUITY, No. 24. *Yancey v. Hopkins*, 419
5. See INFANT, No. 9. *ib.*

### MORTGAGE.

1. A mortgagee without notice shall be protected against a prior equitable title; if the person, having such title, either encouraged him to take the mortgage, or, knowing his intention to take it, stood by, and made no objection. *Green v. Price*, 449

### MOTION IN A SUMMARY WAY.

1. See MUTUAL ASSURANCE SOCIETY, No. 1. *Greenhaw v. Barton*, 590
2. See LANDLORD AND TENANT, No. 1. *Smiths v. Ambler*, 596

### MUTUAL ASSURANCE SOCIETY.

1. *Quere*, whether the purchaser of property, for which a declaration in the Mutual Assurance Society against fire on buildings, has been made by the vendor, be liable for the premium; no policy of insurance having been issued, and no notice of such declaration given, until after payment of the purchase-money? And, if he be liable, is the proper remedy against him by motion in a summary way, or by action at common law? *Greenhaw v. Barton*, 590
2. *Quere*, also; is the property declared for liable, in the possession of the purchaser, who bought and paid for it, without notice of such declaration? *ib.*

### N

### NORTHERN NECK OF VIRGINIA.

1. A patent from the Commonwealth, containing a recital "that the land was escheated from a certain I. M., deceased;" and granting the same, "by virtue of an entry made in the office of the late Lord Proprietor of the *Northern Neck*, and in consideration of the ancient composition of 14. 5s. sterling paid by the grantee into the treasury;" is illegal and void. *Alexander v. Greenup*, 134
2. By the act of compromise, passed the 10th of December, 1796, the title of *Denny Fairfax*, and of those who claim under him, to such of the lands in the *Northern Neck of Virginia*, as were waste and unappropriated at the time of the death of Lord Fairfax, was clearly extinguished. *Hunter v. Fairfax's Devisee*, 218



2. *Quere*, were the several acts of Assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the *Northern Neck*, equivalent to an inquest of office, and sufficient to authorize grants of the said lands by the Commonwealth, independently of the said act of compromise? *Hunter v. Fairfax's Devisee*, 213

## NOTICE

1. Of a *lien* or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance. *Blair v. Orles*, 38
2. A purchaser, with notice of an annual encumbrance having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value, *ib.*
3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff, *ib.*
4. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party, *ib.*
5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance; notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice, *ib.*
6. Under what circumstances a deposition taken at a time and place not mentioned in the notice may be read as evidence. *See DEPOSITIONS*, No. 3. *Marshall v. Frisbie*, 247
7. *Quere*, whether commissioners appointed to take depositions, can, by their own mere authority, adjourn the taking thereof to any other convenient time and place, in the event that the business cannot readily be finished on the day, and at the place, to which the notice applies; no intended adjournment, from day to day until the business be finished, being expressed in such notice? *ib.*
8. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a *lien* claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. *Lewis v. Mudisom*, 303
9. *See INFANT*, No. 9. *Yancey v. Hopkins*, 419
10. *See MORTGAGE*, No. 1. *Green v. Price*, 449
11. An assignee of a bond, without notice, ought not to be affected by an equity, unless the proof of such equity be clear and manifest. *Mayo v. Giles's Adm'r*, 533
12. It seems, that a *bona fide* purchaser, without notice of fraud, having received a deed from two persons, (one of whom fraudulently induced the other to join therein,) is not responsible in equity; but the loss ought to fall on

the fraudulent vendor. But *quere*, in case the estate of the fraudulent vendor be not sufficient to make good the loss. *Whitchorn v. Hines*, 557

13. In such case, the circumstance that the person defrauded was of weak understanding, but not an *idiot* or *lunatic*, is not sufficient to affect the right of the *bona fide* purchaser, *ib.*
14. *See MUTUAL ASSURANCE SOCIETY*, No. 1, 2. *Greenhow v. Barton*, 590

## NULLA BONA.

1. A return of *nulla bona*, upon an execution against an executor or administrator, as such, does not sufficiently establish a *devastavit*. A second suit is necessary before an action can be maintained on the administration bond. *Gordon's Adm'r v. The Justices of Frederick*, 1

NUNCUPATIVE WILL. *See WILLS*

## O

## OATHS.

1. An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 3d section of the act to suppress duelling. *Leigh's case*, 468

OBLIGATION. *See BOND*.

## OFFICE.

1. The practice of LAW is not an office, or place, under the Commonwealth. *Leigh's case*, 468

## OFFICER.

1. What officer may sell distrained effects. *See Smiths v. Ambler*, 596

OFFICE JUDGMENT. *See JUDGMENT*.

## ONUS PROBANDI.

1. In an action on a prison-bonds bond, the plaintiff is only required to shew a departure from the rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law. *Meredith's Adm'r v. Duval*, 76
2. If a vendor of land according to certain lines, be offered as a witness to establish those lines, it is incumbent on the party introducing him, to prove that he is not interested. *Moon v. Campbell*, 600

## OYER.

1. In debt on bond, if the defendant crave *oyer*, and then plead "conditions performed," he

cannot take advantage of a variance between the declaration and bond. *Meredith's Adm'r v. Duval*, 76

P

PAPER MONEY.

1. Money received, by a guardian for a ward, during the paper money times, ought to be reduced by the scale of depreciation; to be applied as on the last day of the year in which it was received. *Hooper and Wife v. Royster and Wife*, 119
2. If money was received, by a guardian for a ward, within six months previous to the 1st of January, 1777, (when the scale of depreciation commenced,) it should be reduced according to the scale, as at the end of six months from the time when received, *ib.*
3. A payment in paper money, by a British debtor to an American creditor, operated a full discharge, to its nominal amount, of a current money debt contrasted in specie; notwithstanding the creditor made objections to receiving the paper money, and observed, at the time, that he would keep it safe for the debtor but did not consider it as a payment, though intended as such by the debtor; and notwithstanding the receipt contained a reservation that, since the creditor had demanded the debt when the rate of exchange was 15 per cent., he therefore claimed so much as might be allowed him, on that account, by arbitrators afterwards to have been (but who never were) appointed. *Day v. Murdoch*, 460
4. See PURCHASE, No. 1. *ib.*

PARTIES.

1. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party. *Blair v. Owles*, 38
2. An administrator to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though such guardian was no party to the decree. *Hooper and Wife v. Royster and Wife*, 119
3. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made, *ib.*
4. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees, *ib.*

5. In a suit in Chancery to recover a tract of land against a vendee, on the ground that the vendor had previously agreed to convey the same land in a certain event, to the plaintiff, it seems, that the vendor, or his legal representatives, ought to be parties. *Lewis v. Madison*, 303
6. See EVIDENCE, No. 16. *Paynes v. Coles*, 378
7. See EVIDENCE, No. 17, 18. *Chapmans v. Chapman*, 398
8. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein, without making such person a party to the suit. *Moon v. Campbell*, 604

PARTNERSHIP.

1. The statute to prevent frauds and perjuries applies to an agreement between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments by the parties. *Henderson v. Hudson*, 510

PATENT FOR LAND.

1. A patent from the Commonwealth, containing a recital "that the land was escheated from a certain I. M., deceased;" and granting the same, "by virtue of an entry made in the office of the late Lord Proprietor of the *Northern Neck*, and in consideration of the ancient composition of 1l. 5s. sterling paid by the grantee into the treasury;" is illegal and void, and not to be received as evidence of title on the general issue in ejectment. *Alexander v. Greenup*, 134
2. The Commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office, and then not (as waste and unappropriated lands) upon entries and surveys; but upon sales by the escheators, *ib.*
3. A patent may be declared void, for defects apparent on its face; without the necessity of resorting to a *scire facias* to repeal it, *ib.*
4. *Quere*, whether, and from what Court, a *scire facias* to repeal a patent can issue in *Virginia*? *ib.*
5. It is not necessary for a patentee of waste and unappropriated land, to make a personal entry thereon, to enable him to maintain ejectment; for the patent *ipso facto* confers *seisin*. *Clay v. White*, 162
6. Such *seisin* may be transferred and continued by deed of bargain and sale, or by devise: but a person, whose *seisin* is interrupted by the actual entry and adverse possession of another cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment, *ib.*
7. *Quere*, were the several acts of Assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the *Northern Neck*, equivalent to an inquest of office, and sufficient to authorize grants of the said lands

- by the Commonwealth? *Hunter v. Fairfax's Devise*, 218  
 2. See PURCHASER, No. 9, 10. *Hull v. Cunningham's Ex'r*, 330

## PAYMENT.

1. See PAPER MONEY, No. 1. *Hooper and Wife, v. Royser and Wife*, 119  
 2. See DO, No. 3, 4. *Day v. Murdoch*, 460  
 3. See PURCHASE, No. 1, *ib.*

## PENALTY.

1. In an action of covenant on a bond with collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty. *Wurd v. Johnston*, 45  
 2. In an action of debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest: and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty. *Atwell's Adm'r v. Towles*, 175  
 3. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law. *Newell v. Wood*, 555

## PENDENTE LITE.

1. An award made *pendente lite* cannot be given in evidence upon the plea of *non assumpsit*. *Harrison v. Brock*, 22

## PERFORMANCE.

1. In what case an attorney in fact, undertaking to have a survey made, is not bound to have it done at all events; but only to a faithful performance, according to the best information he can obtain. *Betts v. Cralle*, 238

## PERSONAL ESTATE.

1. See INFANT, No. 1, 2, 3, 4. *Dilliard v. Tomlinson, &c.*, 183  
 2. See INFANT, No. 5, 6. *Templeman v. Steptoe*, 339

## PLAINTIFF.

1. On a settlement of accounts in a Court of Equity, a decree will be rendered against a plaintiff for a balance of account appearing due to a defendant. *Fitzgerald, Ex'r of Jones, v. Jones*, 150  
 2. See EVIDENCE, No. 17, 18. *Chapman v. Chapman*, 398  
 3. See INJUNCTION, No. 1. *Todd v. Bowyer*, 447  
 4. See ESCAPE, No. 1. *Hoe v. Tebbe and Wife*, 501  
 5. It seems, that a prison-bonds bond, taken payable to the plaintiff, is good at common law, and an action may be maintained upon it, *ib.*

6. *Quere*, whether it be not also good under the act of Assembly? *Hoe v. Tebbe and Wife*, 501

7. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein; without making such third person a party to the suit. *Moen v. Campbell*, 604

## PLEADING.

1. An award made *pendente lite* cannot be given in evidence upon the plea of *non assumpsit*. *Harrison v. Brock*, 22  
 2. The plea "arbitrament and award" (in so many words) is a mere nullity, and no evidence should be received to support it, notwithstanding the plaintiff replied generally, *ib.*  
 3. Where two defendants have appeared and pleaded, an entry in the record that "the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. *Wurd v. Johnston*, 45  
 4. In such case, after confession of judgment by the principal, if further proceedings be taken against the security, the latter ought to be permitted to plead *puis darrein continuance*, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal, *ib.*  
 5. *Quere*, whether such plea, if demurred to, would be good in law to exonerate the security? *ib.*  
 6. In debt on a bond, if the defendant craved *oyer*, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond. See DECLARATION, No. 1. *Meredith's Adm'r v. Drvol*, 76  
 7. A plea in abatement ought not to be received to set aside an office judgment; unless it be of matter which arose *puis darrein continuance*. *Bradley v. Welch*, 384  
 8. What circumstances ought not be admitted as evidence by way of mitigation of damages on a joint plea of "not guilty," in trespass *vi et armis* against two defendants for breaking the plaintiff's close and beating his slaves. *Brown and Boisseau v. May*, 228

## PLEDGE.

1. See LANDLORD, No. 1. 2. *Smiths v. Ambler*, 596

## POLICY OF INSURANCE.

1. How a policy of insurance, "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond" is to be construed. See MARINE INSURANCE, No. 1, 2. *Marine Insurance Company of Alexandria v. Service*, 408

2. See MUTUAL ASSURANCE SOCIETY, No. 1,  
2. *Greenhow v. Burton*, 590

POSSESSION.

1. A person out of possession cannot convey by bargain and sale such a title as will enable the bargainee to recover in ejectment. *Clay v. White*, 162  
2. A defendant in ejectment is protected by 20 years' possession before the action brought; but the 5 years and 174 days excluded by the act of assembly are not to be counted in his favour. *Clay v. Ransome*, 544  
3. See EJECTMENT, No. 7. *ib.*  
4. See PURCHASE, No. 1. *Day v. Murdoch*, 460

POWER.

1. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance. *Yuncney v. Hopkins*, 419

PRACTICE.

1. It is necessary, after a judgment against an executor or administrator, as such, to establish a *devastavit*, by means of a second suit, before an action can be maintained on the administration bond. *Gordon's Adm'r v. The Justices of Frederick*, 1  
2. Although, upon a demurrer to evidence, the testimony adduced on both sides ought regularly to be stated, yet, if it be parol and contradictory, the party tendering the demurrer cannot, after exhibiting his testimony, compel the other party to join in demurrer. *Harrison v. Brock*, 22  
3. An award, made *pendente lite*, cannot be given in evidence upon the plea of *non assumpt*, *ib.*  
4. The plea of "arbitrament and award," (in so many words,) is a mere nullity; and no evidence should be received to support it, notwithstanding the plaintiff replied generally, *ib.*  
5. In an action of covenant on a bond with a collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty: but where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach. *Ward v. Johnston*, 45  
6. Where two defendants have appeared and pleaded an entry in the record that "the parties came, &c., and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. *ib.*  
7. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other, *ib.*  
8. In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing, by a

- bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the Court, in reversing the judgment, ought to have given the security leave to plead *puis darrein continuance*; all the proceedings having been brought up by a writ of *supersedeas*. *Ward v. Johnston*, 45  
9. Several judgments and orders, relating to each other, may be brought up by one writ of *supersedeas*; provided the whole be sufficiently described, as intended to be comprehended therein, *ib.*  
10. A judgment at rules in the clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term: but, if it be entered as at rules only, it is merely a clerical misprision, and therefore amendable. *Digger's Ex'r v. Duan's Ex'r*, 56  
11. In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial, *ib.*  
12. See DISCOVERY, No. 2. *Chichester's Ex'r v. Vass's Adm'r*, 98  
13. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made. *Hooper and Wife v. Royster and Wife*, 119  
14. In a suit for contribution against legatees or distributees, the executor or administrator when to be made a party; and when not, *ib.*  
15. On a settlement of accounts in a Court of Equity, a decree will be rendered, against a plaintiff, for a balance of account appearing due to a defendant. *Fitzgerald, Ex'r of Jones v. Jones*, 150  
16. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. *Hunter v. Fairfax's Devisee*, 218  
17. Upon an appeal from a decree in Chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal. *Day v. Murdoch*, 460  
18. GENERAL RULE of the Court of Appeals relative to correction of errors operating to the injury of the appellee or defendant in error, *ib. in note.*  
19. See INJUNCTION, No. 2. *Humphrey's Adm'r v. McCienuchar's Adm'r and Heirs*, 500  
20. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein; without making such person a party to the suit. *Moon v. Campbell*, 604

PREMIUM.

1. What is such a deviation, from the voyage, as will prevent the person insured from being entitled to a return of premium, on a marine insurance, "at and from *Norfolk to Curacao*," with liberty of going to any other island in the

*West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond.* *Marine Insurance Company of Alexandria v. Stras,* 408

3. *Quere*, whether the purchaser of property, for which a declaration, in the mutual assurance society against fire on buildings, has been made by the vendor, be liable for the premium; no policy of insurance having been issued, and no notice of such declaration given, until after payment of the purchase-money? And, if he be liable, is the proper remedy against him by motion in a summary way, or by action at common law? *Greenhaw v. Barton,* 590
3. *Quere*, also, is the property declared for liable in the possession of the purchaser who bought and paid for it without notice of such declaration, *ib.*

### PRESUMPTION.

1. In what case a commission to take depositions should be presumed to have been directed to persons agreed upon by the parties, but whose names were omitted by the clerk in entering the order. *See DEPOSITIONS, No. 1. Marshall v. Frisbie,* 247
2. Under what circumstances a person who consented to postpone the taking a deposition to another time and place may be presumed to have been the authorized agent of the party. *See DEPOSITIONS, No. 3. ib.*

### PRESUMPTION OF FRAUD.

*See FRAUD.*

### PRESUMPTION OF INTEREST.

1. *See WITNESS, No. 3. Moon v. Campbell,* 600

### PRINCIPAL AND SECURITY.

1. *Quere*, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party? *Ward v. Johnston,* 45
2. *See SECURITIES, No. 6, 7. Bullitt's Ex'rs v. Winatons,* 269

### PRINCIPAL SUM OF MONEY.

1. A guardian may be allowed for moneys paid and advanced for the clothes, schooling and other necessary expenses of the ward, out of the principal of such ward's estate; if it appear that from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of such guardian; otherwise such allowance ought to be made out of the profits only. *Hooper and Wife v. Royster and Wife,* 119

### PRISONER.

*See PRISON RULES.*

### PRISON RULES.

1. A debtor within the prison rules is still a true prisoner in the eye of the law; and, as such, should be transferred by the sheriff to his successor in office. *Meredith's Adm'r v. Deval,* 76
2. A bond for keeping the prison rules should be taken to the sheriff for the time being and his successors in office; not his "executors, administrators or assigns," *ib.*
3. But such bond, though taken to the sheriff, as such, and to his "executors, administrators or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it, *ib.*
4. *Quere*, can such a bond, so taken, be assigned to the creditor by the succeeding sheriff? *ib.*
5. The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees; but the sheriff cannot legally discharge him, unless he be actually insolvent, and, being so, the plaintiff, having notice thereof, refuse to pay his fees, or to give bond for the payment thereof, *ib.*
6. If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff, *ib.*
7. In an action on such bond, the plaintiff is only required to shew a departure from the rules; the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law, *ib.*
8. If, in a suit upon a prison-bonds bond, a Court possessing competent jurisdiction adjudge the bond void; the plaintiff may sue the sheriff, without appealing from the judgment, though erroneous. *Hoac v. Tebbs and Wife,* 501
9. In such case, the sheriff, though not a party to the suit on the bond, is bound by the judgment; unless he can prove it was obtained by collusion, *ib.*
10. In an action against the sheriff for an escape, a verdict in general terms, for the plaintiff is not sufficient to authorize a judgment; notwithstanding the charge in the declaration, be that the sheriff took a defective prison-bonds bond, and thereupon voluntarily permitted the prisoner to escape; and issue be joined on the plea of not guilty. An express finding by the Jury according to the act of 1792 concerning escapes, is absolutely necessary, *ib.*
11. *It seems*, that a prison-bonds bond, taken payable to the plaintiff, is good at common law, and an action may be maintained upon it, *ib.*
12. *Quere*, whether it be not also good under the act of Assembly? *ib.*

### PROBATE.

1. What is sufficient evidence for the probate of a nuncupative will. *See WILLS, No. 3. Mussen v. Dunman,* 456

PROFITS.

2. In general a ward's expenses ought to be paid out of the profits only of his estate; but, under extraordinary circumstances, a guardian may be allowed for moneys paid and advanced for the clothes, schooling and other necessary expenses of the ward out of the principal of such estate. *Hooper and Wife v. Royster and Wife*, 119
2. The profits of the estate of an infant dying intestate, (including the increase of slaves,) accruing to such infant in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person, or persons, inheriting such estate generally. *Dilliard v. Tomlinson, &c.*, 183
3. Interest on the hire of slaves disallowed, *ib.* and *Whitcomb v. Hines*, 557

PROMISE.

1. If A. promise B. that, if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters, as fast as it is in his power with convenience;" and the marriage be afterwards had with his consent; the promise is sufficiently certain and obligatory. *Chichester's Ex'x v. Vase's Adm'r*, 98
2. In such case, A. has not his life-time to perform it in; but, in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to B. and wife, equal to the largest made to his other daughters, *ib.*
3. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and, if he survive the wife, may sue in his own right to recover damages for a breach, *ib.*
4. The aid of a Court of Equity ought not to be afforded to set up a marriage promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage. *Paynes v. Coles*, 373
5. *Assumpsit* for use and occupation of land, by permission of the plaintiff, lies on an implied, as well as express promise. *Sutton v. Mandeville*, 407
6. A promise, by an obligor, after being informed of the assignment of his bond, to pay the full amount thereof to the assignee, is a strong circumstance to prevent the assignee from being affected by an equity of which he had no notice. *Mayo v. Giles's Adm'r*, 533

PROTEST.

1. Under what circumstances, a protest before a notary public, by the master of a vessel, is of evidence. *Marine Insurance Company of Alexandria v. Straz*, 408

PURCHASE.

See PURCHASER.

1. A factor and agent for a company of British merchants having, in the year 1771, purchased, on their behalf, a tract of land in Virginia, for a sum of money payable on demand, and then received possession thereof for their use; and a credit for the money having been entered in their books; the equitable title to, and possession of, such land was thereby completely vested in the company; and under the act of May session, 1779, "concerning escheats and forfeitures from British subjects," the same escheated to the Commonwealth, which, on inquest found, became entitled, in the same manner the company were entitled; but subject to the payment of so much only of the purchase-money, remaining due, as did not exceed the net amount for which the land was sold by the escheator, reduced to present current money, according to the 2d section of that act; the said British company being still liable for the residue of the said purchase-money. *Day v. Murdoch*, 460
2. See VENDOR AND VENDEE, No. 10, 11, 12, 13. *Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs*, 493, 500
3. The statute, "to prevent frauds and perjuries," applies to an agreement, between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments of the parties. *Henderson v. Hudson*, 510

PURCHASE MONEY.

1. See LANDS, No. 32, 33, 34, 35. *Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs*, 483, 500

PURCHASER.

1. Notice of a lien or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance. *Blair v. Owles*, 38
2. A purchaser with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value, *ib.*
3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff, *ib.*
4. In a suit in equity by the claimant of an encumbrance against a purchaser having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party, *ib.*
5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person what-

- soever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice. *Blair v. Owles*, 38
6. A purchaser having taken a bond for a title to a certain number of acres of land, but not binding to the obligors to convey any other specific lands to make good a deficiency; his only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable. *Chinn v. Heale*, 62
7. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. *Lewis v. Madisons*, 303
8. See EQUITY, No. 18. *ib.*
9. Though land be sold in gross, for so much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency. *Hull v. Cunningham's Ex'r*, 330
10. But if the purchaser do not (by eviction or otherwise) lose the land he expected to get; but make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for troubles therein, and actual costs of suit. *ib.*
11. A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken. *ib.* 336
12. See note to the same case, p. 338
13. Where, by a decree in Chancery, so much of the bill as claims one of two separate subjects in controversy is dismissed, and, as to the other, the rights of the parties are determined, but an account is directed to be taken, and therefore the decree is not final; *quere*, whether any subsequent decree could affect the rights of *bona fide* purchasers of property as to which the bill was dismissed? *Templeman v. Steeles*, 339
14. See EQUITY, No. 24. *Tancey v. Hopkins*, 419
15. See INFANT, No. 9. *ib.*
16. See MORTGAGE, No. 1. *Green v. Price*, 449
17. See PURCHASE, No. 1. *Day v. Murdoch*, 480
18. See VENDOR AND VENDEE, No. 10, 11, 12, 13. *Humphrey's Adm'r v. McClennahan's Adm'r and Heirs*, 493. 500
19. See PURCHASE, No. 3. *Henderson v. Hudson*, 510
20. It seems, that a *bona fide* purchaser, without notice of fraud, having received a deed from two persons (one of whom fraudulently induced the other to join therein,) is not responsible in equity; but the loss ought to fall on the fraudulent vendor. *Whitehorn and Wife v. Hines and others*, 557
- But *quere*, in case the estate of the fraudulent vendor be not sufficient to make good the loss? *ib.*
21. In such case, the circumstance that the person defrauded was of weak understanding, but not an idiot or lunatic, is not sufficient to affect the right of the *bona fide* purchaser. *ib.*
22. *Quere* whether a purchaser, without notice, of property not insured, but only declared for by the vendor in the Mutual Assurance Society against fire on buildings, be liable for the premium? See MUTUAL ASSURANCE SOCIETY, No. 1, 2. *Greenhow v. Barton*, 590

## R

## REAL ESTATE.

## See LANDS.

1. A fee-simple estate in lands might pass by a will (even before the act of 1785, c. 62.) without words of perpetuity, or any words equivalent thereto; provided it appeared, from the whole will taken together, that such was the intention of the testator. *Johnson and others v. Johnson's Widow and Heirs*, 549
2. Where an illiterate testator uses the same words in disposing of his real, as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property. *ib.*

## RECORD.

1. In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court;" and the answer having admitted that such a suit was brought, and such a decree as stated in the bill existed; the Court of Appeals will award a writ of *certiorari* for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer. *Hooper and Wife v. Royster and Wife*, 119
2. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only. *Eppes v. Craile*, 258
3. A record of one suit cannot be read as evidence in another, unless both the parties, or those under whom they claim, were parties to both suits; it being a rule that a document cannot be used against a party who could not avail himself of it, in case it made in his favour. *Paynes v. Coles and others*, 373
4. A record of one suit cannot be read as evidence

- in another, on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both, another plaintiff, and the person under whom both the said plaintiffs jointly claim, not having been parties to such former suit. *Chapman v. Chapman*, 398
5. In such case, the circumstance, that the "writings and evidence" in the former suit were read at the hearing of the latter, without any exception taken at the time appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the appellate Court; the defendant in his answer having objected to the admission of the verdict and other proceedings in the former suit, but offered to agree that the depositions only might be read; to which offer no assent appeared on the part of the plaintiff, *ib.*
1. A writ of *supersedeas*, to a judgment obtained in the name of the governor, for the benefit of a relator, ought to be served on such relator, and not on the governor. *Newell v. Wood*, 555

### RELATOR.

- RELEASE.
1. A plaintiff, by directing the sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the possession of the principal defendant, or his securities, releases the securities altogether from that, or any subsequent execution; such direction being given without their concurrence. *Bullitt's Ex'rs v. Winstons*, 269
2. In such case, the plaintiff's adding to the direction the words "holding the property subject to the said execution," cannot prevent the release from operating, *ib.*
3. See *EQUITY*, No. 24. *Yancey v. Hopkins*, 419
4. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein, without making such person a party to the suit. *Mason v. Campbell*, 604
13. And in case of a deficiency in land purchase
14. In a suit in Chancery brought by a widow and devisees to recover a tract of land, in which the widow is entitled to Dower, the Court under the prayer for general relief, will decree assignment of dower to the widow, partition of the land among the devisees, and rents and profits against the defendant. *Note to p. 51*
15. Under the prayer for general relief, the plaintiff may have any particular relief, not inconsistent with the case made by his bill. *Samuel's note*, 51

### RELINQUISHMENT.

1. A deed from a husband and wife, without her private examination and relinquishment, is utterly void as to her. *Harvey and Wife v. Pecks*, 51

### RELIEF.

1. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the deficiency and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law. *Chinn v. Heale*, 63
2. See *DISCOVERY*, No. 2. *Chichester's Ex'r v. Vass's Adm'r*, 98
3. See *PURCHASER*, No. 9. *Hull v. Cunningham's Ex'r*, 330
- VOL. I.

### RENTS.

1. A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond; unless it appear that such bond was taken by a sheriff, or other officer legally authorized to make distress, and sell the distrained effects. *Smith's v. Ambler*, 51
2. A landlord, in person, or by a private agent, may levy a distress; but cannot sell the distrained effects, which, in such case, are out to be held as a pledge, to compel the tenant to pay the rent,

### REPLEVIN.

See *RENTS*.



## REPLICATION.

1. The plaintiff's replying generally to the plea of "arbitrament and award" (in so many words) does not authorize evidence to be received in support of such plea, which is a mere nullity. *Harrison v. Brock*, 22

## RETURN.

1. A commission directed to five persons, ("any three of whom to act") cannot be executed by one only: and a return by one, that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who were present. *Marshall v. Frisbie*, 247
2. Parol evidence is admissible to prove that a *fa. fa.* was levied, though no return was made upon it. *Bullitt's Ex'rs v. Winstons*, 269
3. A sheriff may be permitted by order of Court, to make a return upon an execution, or to amend it, according to the truth of the case, at any time after the return day, *ib.*
4. See EXECUTION, No. 9, 10. *ib.*

## REVENUE.

See COMMISSIONERS OF REVENUE.

## REVIEW.

1. See BILL IN CHANCERY, No. 1. *Templeman v. Sieptoe*, 339

## REVEFOR.

1. An appeal from, or *superseades* to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only. *Bullitt's Ex'rs v. Winstons*, 269

## RULES IN CLERK'S OFFICE.

2. Where appearance bail is required, the defendant cannot appear at the rules, without giving special bail. *Bradley v. Welch*, 284

## S

## SALE.

See VENDOR AND VENDEE.

1. *Quere*, under what circumstances can a Court of Equity decree a sale, of land descended or devised, without any specific lien, or charge either general or special, by conveyance or will? *Mason's Devises v. Peter's Adm'rs*, 437
2. See INJUNCTION, No. 2. *Humphrey's Adm'r v. McElenachan's Adm'r and Heirs*, 493

## SATISFACTION.

1. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor. *Atwell's Adm'r v. Towles*, 175

## SCIRE FACIAS.

1. A patent may be declared void, for defects apparent on its face, without the necessity of resorting to a *scire facias* to repeal it. *Alexander v. Greenup*, 134
2. *Quere*, whether, and from what Court, a *scire facias* to repeal a patent can issue in Virginia? *ib.*

## SCROLL.

1. A scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appears, from some expression in the body of the instrument, that it was intended as such. *Austin's Adm'r v. Whitlock's Ex'rs*, 487

## SEAL.

See SCROLL.

## SECURITIES.

1. An action cannot be maintained against the securities of an executor or administrator until a *devastavit* has been established by means of a second suit, after a judgment against the executor or administrator as such. *Gordon's Adm'r v. The Justices of Frederick*, 1
2. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W. his security, shall, &c. then this obligation to be void;" &c. *Ward v. Johnston*, 45
3. After a confession of judgment by the principal, further proceedings may be had against the security, *ib.*
4. In such case, if the judgment was confessed, by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal, the security ought to be permitted to plead that circumstance *puis darrein continuance*, *ib.*
5. *Quere*, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party? *ib.*
6. A plaintiff, by directing the sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the possession of the principal defendant, or his securities, releases the securities altogether from that or any subsequent execution; such direction being given without their concurrence. *Bullitt's Ex'rs v. Winstons*, 269

7. In such case, the plaintiff's adding to the direction the words, "holding the property subject to the said execution," cannot prevent the release from operating. *Bullitt's Ex'rs v. Winston*, 269
8. At the foot of a bond, with a penalty and condition in the usual form, signed and sealed by I. S. a writing is signed and sealed by T. A. in the following words: "I, T. A. join in the above obligation with I. S., and am his security for the above sum of —," (mentioning the sum specified in the condition,) this, *it seems*, is a joint obligation; and judgment may be rendered against T. A. for the penalty, to be discharged by the sum in the condition, with interest. *Arnold's Adm'rs v. Towles*, 175
9. An assignment of such an instrument, by the words, "I assign the within obligation," is a good assignment of the claim upon T. A. as well as I. S. *ib.*
10. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor. *ib.*
- See EXECUTION, No. 6, 6. *Bullitt's Ex'rs v. Winston*, 269
8. In what case the sheriff is responsible to the plaintiff if the property be not produced on the day of sale, *ib.*
9. Parol evidence is admissible to prove that a *fi. fa.* was levied, though no return was made upon it, *ib.*
10. A sheriff may be permitted, by order of Court, to make a return upon an execution, or to amend it, according to the truth of the case at any time after the return day, *ib.*
11. See EXECUTION, No. 9, 10. *ib.*
12. See EQUITY, No. 24. *Fancey v. Hopkins*, 41
13. See INFANT, No. 9. *ib.*
14. If, in a suit upon a prison-bonds bond, a Court possessing competent jurisdiction, adjudge the bond void; the plaintiff may sue the sheriff without appealing from the judgment, though erroneous. *Hose v. Tibbs and Wife*, 50
15. In such case the sheriff, though not a party to the suit on the bond, is bound by the judgment, unless he can prove it was obtained by collusion, *ib.*
16. See ESCAPE, No. 1. *ib.*
17. See RENTS, No. 1, 2. *Smiths v. Ambler*, 59

### SEISIN.

1. A patent for land *ipso facto* confers seisin. *Clay v. White*, 162
2. Such seisin may be transferred and continued by deed of bargain and sale, or by devise; but may be interrupted by actual entry and adverse possession, *ib.*

### SET-OFF.

1. A debtor ought not to be allowed a set-off (even in equity) for unliquidated and disputed claims against his creditor, purchased by him after suit brought by the creditor against him. *Danversfield v. Rootes, Adm'r of Baylor*, 529

### SHERIFF.

1. The sheriff ought to transfer the debtors within the prison rules to his successor in office. *Meredith's Adm'r v. Duval*, 76
2. A bond for keeping the prison rules should be taken to the sheriff for the time being, and his successors in office, not to his "executors, administrators or assigns," *ib.*
3. But such bond, though taken to the sheriff, as such, and to "his executors, administrators or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it, *ib.*
4. *Quære*, can such a bond, so taken, be assigned to the creditor by the succeeding sheriff? *ib.*
5. The sheriff cannot legally discharge a prisoner from the rules unless he be actually insolvent, and, being so, the plaintiff, having notice thereof, refuse to pay his fees, or to give bond for the payment thereof, *ib.*
6. If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff, *ib.*
7. In what manner a sheriff may levy a *fi. fa.*

1. An executor or administrator, hiring slave belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due; (no proof appearing that it was then collected, or that interest from that day was received upon it;) but a reasonable time to collect and apply the money should be allowed before the commencement of interest. *Dillard v. Tomlinson, &c.*, 18
2. In such case, no interest ought to be charge where the right to the slaves was in dispute and it was doubtful to whom the money, when collected, should be paid, no proof appearing that the executor or administrator received any interest, or made any profit, *ib.*
3. See INFANT, No. 4. *ib.*
4. On a joint plea of "not guilty," in trespass *et armis* against two defendants, for breaking the plaintiff's close, and beating his slaves, the defendants ought not to be permitted to give in evidence, by way of mitigation of damages, a license from the plaintiff to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly; the battery being committed by the other defendant; and no proof appearing that the slave who were beaten had acted improperly. *Brown and Housseau v. May*, 28
5. Interest on the hire of slaves disallowed. *Whitehorn v. Hince*, 55

### SIGNATURE.

See SCROLL.

### SLAVES.

### SPECIALTY.

See SCROLL.

## SPECIFIC PERFORMANCE.

2. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law. *Chian v. Heale*, 63

2. It seems that a contract, under seal, between two brothers, by which one of them, for a fair and valuable consideration, agrees, that, when he shall obtain possession of a tract of land expected to be devised to him by their father, he will convey it to the other, is not *contra bonos mores*, and may support an action of covenant at law, or be enforced specifically in a Court of Equity. *Lewis v. Madison*, 303

3. See INJUNCTION, No. 2. *Humphrey's Adm'r v. Mc'Clenachan's Adm'r and Heirs*, 493

## STIPULATIONS.

1. In an action of covenant on a bond with collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty: but, where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach. *Ward v. Johnston*, 45
3. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W. his security, shall, &c., then this obligation to be void," &c. *ib.*

## SUPERSEDEAS.

Several judgments and orders, relating to each other, may be brought up by one writ of *supersedeas*; provided the whole be sufficiently described, as intended to be comprehended therein. *Ward v. Johnston*, 45

2. See APPEAL, No. 4. *Bullitt's Ex'rs v. Wintons*, 269
1. See GENERAL RULE, in note to p. 460
1. A writ of *supersedeas*, to a judgment obtained in the name of the Governor, for the benefit of a relator, ought to be served on such relator, and not on the Governor. *Newell v. Wood*, 555

## SURETIES.

See SECURITIES.

## SURPLUSAGE.

1. If a Jury in a mill case erroneously assess other

damages, besides those which properly ought to be assessed, but find them separately, and the Court do not direct such erroneous damages to be paid; it should be regarded as surplusage; the petition for the writ of *ad quod damnum* having prayed for such inquiry only as the law authorizes. *Eppes v. Cralle*, 255

## SURVEY.

1. See ENTRIES AND SURVEYS.

2. What degree of diligence is required of an attorney in fact undertaking to have a tract of land (with the situation of which he does not profess himself personally acquainted) surveyed for a part thereof, and upon terms "in case the land cannot be found, to have a proportional part of the damages which may be recovered, by his employer of the person of whom he bought, and a proportional part of his expenses paid." *Betts v. Cralle*, 238
3. In this case the attorney in fact being imposed upon by the County Surveyor, and, in consequence of such imposition, having a survey made of land not purchased by his employer, was held not responsible for his mistake, and not thereby barred of his claims under the contract, *ib.*

## T

## TAXES.

1. The land of an infant being, by mistake, listed by the Commissioner of the revenue as the property of another person, and sold as such for taxes, in December, 1786; being bought by the deputy sheriff who sold it; conveyed to him by the high sheriff in February, 1795; and afterwards sold again by the deputy sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age. *Fancy v. Hopkins*, 419

## TENANT.

See LANDLORD AND TENANT.

## TRANSFER OF PRISONERS.

1. A debtor within the prison rules is still a true prisoner in the eye of the law: and, as such, should be transferred by the sheriff to his successor in office. *Meredith's Adm'r v. Duval*, 76

## TREATY.

1. *Quere*, whether, by virtue of the treaty of 1783, persons born in Great Britain, and residing there on the 4th of July, 1776, could, without ever thereafter becoming citizens of

*Virginia*, or of any one of the *United States of America*, take and hold lands in *Virginia*, by descent, or devise, accruing between that day and the date of the said treaty? *Hunter v. Fairfax's Devisee*, 218

### TRESPASS.

1. See ATTORNEY IN FACT, No. 1, 2, 3. *Betts v. Cralle*, 238
2. On a joint plea of "not guilty," in trespass *vi et armis* against two defendants, for breaking the plaintiff's close, and beating his slaves, the defendants ought not to be permitted to give in evidence, by way of mitigation of damages, a license from the plaintiff to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly; the battery being committed by the other defendant; and no proof appearing that the slaves who were beaten had acted improperly. *Brown and Boisseau v. May*, 288

### TRUST AND CONFIDENCE,

1. Breach of, is a circumstance from which fraud may be presumed in a Court of Equity. *Whitehorn and Wife v. Hines and others*, 557

### U

### USE AND OCCUPATION.

1. *Assumpsit*, for use and occupation of land by permission of the plaintiff, lies on an implied, as well as express promise. *Sutton v. Mundeville*, 407

### V

### VARIANCE.

1. In debt on a bond, if the defendant crave *oyer*, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond; and, though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient. *Meredith's Adm'r v. Duval*, 76
2. If a judgment of a County Court be declared upon as of a quarterly term, and the transcript produced be a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial. *Diggs's Ex'r v. Dunn's Ex'r*, 56
3. A writ of *feri facias* against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and, as to other damages and costs, of her own goods and chattels," was returned "executed on certain slaves the property of the adminis-
- tratrix, and a forthcoming bond taken," &c. The bond being given by the administratrix, *ex nomine*, but expressing that the *fi. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *fi. fa.* and therefore quashed. *Glascock's Adm'r v. Dawson*, 605
4. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken, *ib.*
- VENDOR AND VENDEE.  
See PURCHASER.
1. In a suit in equity, by the claimant of an encumbrance, against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party. *Blair v. Owles*, 38
2. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever: for the vendor himself may be purchasing agent for the vendee, by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice, *ib.*
3. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not bidding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money according to the price agreed on for the whole tract, with lawful interest from the time the same was payable. *Chinn v. Heule*, 6
4. In a suit in Chancery to recover a tract of land against a vendee, on the ground that the vendor had previously agreed to convey the same land, in a certain event, to the plaintiff, it seems, that the vendor, or his legal representatives, ought to be parties. *Lewis v. Madsons*, 36
5. Though land be sold in gross, for so much, by it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency. *Hull v. Cunningham's Ex'r*, 36
6. But, if the purchaser do not (by eviction, or otherwise) lose the land he expected to get, but make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for trouble therein, and actual costs of suit, &c.
7. *Quare*, whether, in this case, an action at law could have been maintained upon the title bond?
8. A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or qu

tity, (appearing, also, better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken. *Hull v. Cunningham's Ex'r*, 336

9. See note to same case, p. 338

10. If, by a sealed instrument, a vendor declare that he has sold to the vendee all his right to certain land warrants, for which the surveyor's receipt has been taken; that, if patents have issued in his name, he will transfer the same by deed; and, if not, desires that they may issue to the vendee; agreeing to pay, or deduct from the purchase-money, all expenses which have accrued; he is bound to make a deduction for a deficiency resulting from a previous contract, by his agent, to allow the locator one third of the land; though such contract was not known to him at the time of his bargain with the vendee, to whom it was equally unknown. *Humphrey's Adm'r v. Mc Clements's Adm'r and Heirs*, 493

11. On a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, (in whom the legal title remained,) claiming compensation for a deficiency, credits for payments and a conveyance; the Court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees to be by them conveyed to the heirs of the purchaser, (though not parties to the suit,) if the balance of the purchase-money be paid on or before a certain day; and, if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs, *ib.*

12. In case of eviction after a conveyance made with warranty, the value of the lost land, as at the time of the eviction, gives the rule by which the vendee is to be remunerated; but, when the contract is executory, a Court of Equity will adjust it, upon principles of equity, according to the circumstances. *Same case*, p. 500

13. In case of a deficiency, the value at the time of the contract gives the rule; of which the purchase-money is the standard, where it does not appear that the actual value was different, *ib.*

4. See PURCHASE, No. 3. *Henderson v. Hudson*, 510

5. See PURCHASER, No. 20, 21. *Whitehorn v. Hines*, 557

6. See DEED, No. 10, 11. *Harvey and Wife v. Pecks*, 518

7. See FRAUD, No. 4. *Whitehorn v. Hines*, 557

8. A vendor of land, according to certain lines, must be presumed interested, and therefore incompetent, as a witness, to establish those lines; unless it appear that he did not warrant the title. *Moon v. Campbell, Executor of McDonald*, 600

## VENIRE DE NOVO.

See VERDICT.

## VERDICT.

1. In ejectment, if the jury find a special verdict shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part with so much precision as that possession thereof may with certainty be delivered; a *venire de novo* ought to be awarded. *Clay v. White*, 162

2. What degree of uncertainty and inaccuracy of language is sufficient to set aside the finding of a jury in a mill case. *Eppes v. Cralle*, 258

3. On a petition for leave to add to the height of a mill dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the jury to assess such other damages, as accruing from the dam already erected, as were not contemplated by the original jury, *ib.*

4. But an error in this respect should be regarded as surplusage, (the petition for the writ of *ad quod damnum* having prayed only for such inquiry as the law authorizes,) if the jury assessed such erroneous damages separately, and the Court did not direct the same to be paid, but only the damages properly assessed, *ib.*

5. The finding of a Jury, in a mill case, that "probably the health of certain families who live near the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner. *Mayo v. Turner*, 405

6. If, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 174 days, a *venire de novo* ought to be awarded. *Clay v. Ransome*, 454

7. In an action against the sheriff for an escape, a verdict, in general terms, for the plaintiff, is not sufficient to authorize a judgment. An express finding by the Jury according to the act of 1792, concerning escapes, is absolutely necessary. *Hose v. Tobbs and Wife*, 501

## VOUCHERS.

See EVIDENCE, No. 11. *Fitzgerald, Ex'r of Jones, v. Jones*, 150

## VOYAGE.

See DEVIATION.

## W

## WARRANTY.

1. What is the measure of relief in case of evic-

- tion from land purchased with warranty.  
*Humphrey's Adm'r v. Mc'Clenachan's Adm'r and Heirs*, 500  
 2. And in case of a deficiency, *ib.*

WILLS.

1. A wealthy testator having bequeathed pecuniary legacies to three of his daughters, to be paid them, "if the money could be raised by his estate by the time that either of them should marry, or come of age;" (without saying any thing about their maintenance or education,) it was held that they were entitled (notwithstanding their legacies) to maintenance and education out of the estate; at least while the legacies were not sufficiently productive. *Fitzgerald, Ex'r of Jones, v. Jones*, 150
2. *Quere*, whether a Court of Equity ought, under any circumstances, to assist, to the prejudice of a *posthumous* child, the claim of devisees under a will (made before the 1st of January, 1787) by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy? *Paynes v. Coles*, 373
3. A man on his death bed, at his own house, and in his proper senses, sent for a neighbour to make his will, who took notes thereof in his presence, and in that of another witness who was present all the time, and heard the sick man request the first witness to make his will, and direct each note to be taken. A third witness was not present when the first began to take notes, but was present afterwards, and heard some of the notes dictated. Two of the witnesses swore that the notes, or most of them, were read to the decedent, but were not positive that the whole were; nor did the sick man read them himself; but he was then in his proper senses. After the first witness had made a draught of a will from the notes, the decedent was incapable of reading, or hearing it read; being at that time delirious. The notes taken as aforesaid were established as a good-nuncupative will. *Mason v. Druman*, 456
4. In construing wills, the cardinal rule is to collect the intention of the testator from the whole will taken together, without regard to any thing technical, or any particular form of words; and, if such intention be lawful, (as not creating perpetuities, or the like, full effect ought to be given to it by the Courts. *Wyatt v. Sadler's Heirs*, 537
5. A testator (who died in the year 1768) expressed himself, in the introductory part of his will, thus; "and as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth. In the next clause he "wills and desires that his wife should enjoy all his land during her life, and after her decease gives and bequeaths to his two sons, all his land, to be equally divided between them; his still, likewise, to be between them, to dis-

- til for their own use, and, after, to his eldest son. A fee-simple estate in his share of the land passed to the younger son. *Wyatt v. Sadler's Heirs*, 537
6. A fee-simple estate, in lands, might pass by a will (even before the act of 1785, c. 62.) without words of perpetuity, or any words equivalent; provided it appeared, from the whole will taken together, that such was the intention of the testator. *Johnson and others v. Johnson's Widow and Heirs*, 549
  7. Where an illiterate testator uses the same words in disposing of his real, as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property, *ib.*

WITNESS.

1. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee, by his appointment, and the vendee, by constituting him his agent, makes him a competent witness to prove the notice. *Blair v. Owles*, 38
2. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses. *Eppes v. Cralle*, 258
3. A vendor of land according to certain lines, must be presumed interested, and therefore incompetent, as a witness, to establish those lines; unless it appear that he did not warrant the title. *Moon v. Campbell*, 600

WITNESSES.

See EVIDENCE.

1. The Jury, and not the Court, are exclusively judges of the credibility of witnesses. *Harrison v. Brock*, 22

WRITS.

1. Several judgments and orders, relating to each other, may be brought up by one writ of *superseatas*; provided the whole be sufficiently described, as intended to be comprehended therein. *Ward v. Johnston*, 450
2. See ERROR, and note to p. 460
3. A writ of *superseatas* to a judgment obtained in the name of the Governor for the benefit of a relator, ought to be served on such relator, and not on the Governor. *Newell v. Wood*, 555

*Edw. P. J. T.*


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